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Supreme Court, U.S.
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IN THE OFFICE OF THE CLERK

Supreme Court of the United States

ILLINOIS CENTRAL RAILROAD COMPANY

Petitioner,

v.

DELBERT COPPLE, CARL HEINRICHSMEYER, and DONALD HYATT

Respondents.

On Petition For a Writ of Certiorari to the Appellate Court of Illinois, Fifth District

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PETITION FOR WRIT OF CERTIORARI

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AUGUST 27, 2008

QUESTION PRESENTED

In *Norfolk & Western Ry. Co. v. Ayers*, the Court held that asbestos plaintiffs diagnosed with asbestosis can recover damages for fear of contracting cancer in the future, so long as that fear is "genuine and serious." The question presented here is whether it was error for the court below, in conflict with this Court's precedent and at least one lower court, to award damages for fear of contracting cancer in the future where the plaintiffs' only evidence that the fear was "genuine and serious" was the plaintiffs' own subjective testimony of generalized worry, uncorroborated by objective evidence of serious fear.

LIST OF PARTIES

In addition to the parties listed in the caption, the following were parties in the action below, but have no interest in this petition:

Xon Blackburn
Herlie Bowerman
George Briggs
James Callahan
Lonnie Davis
Joseph Denk
Marvin Donoho
David Eversgerd
Tom Gilliland
Juan Gonzalez
Daniel Hogan
Robert Jerkatis
Vernon Landers
Bert Rostance
Donald Smith
Robert Spencer
Forrest Stewart, Jr.
Thomas Mitchell
Norman Wilkey
Herbert Williams
Versey Williams
Peter Yurasovich

RULE 29.6 STATEMENT

Illinois Central Railroad Company is a wholly-owned subsidiary of Illinois Central Corporation, which is a wholly-owned subsidiary of Grand Trunk Corporation, which is a wholly-owned subsidiary of Canadian National Railway Company, a publicly traded company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Illinois Central Railroad Company ("Illinois Central") respectfully submits this petition for a writ of certiorari to review the judgment of the Illinois Supreme Court.

OPINIONS BELOW

The judgment for which review is sought is decision of the Appellate Court of Illinois, Fifth District, which affirmed the judgment of the Circuit Court for Marion County, Illinois in *Xon Blackburn et al. (Delbert Copple, et al.) v. Illinois Central Railroad Co.*, No. 5-06-0618. After the presentation of the plaintiffs' evidence and after a jury verdict in favor of the plaintiffs, the Circuit Court of Marion County denied Illinois Central's motion for directed verdict. The circuit court likewise denied Illinois Central's post-trial motion for judgment notwithstanding the verdict, motion for a new trial, and motion to remit damages for pain and suffering and for future medical expenses. The orders of the circuit court denying Illinois Central's motions are not published and are reflected in a docket entry that is reproduced in the Petition Appendix ("Pet. App.") at p. 121a. The opinion of the Appellate Court of Illinois, Fifth District, is reported at 379 Ill.App.3d 426 and 882 N.E.2d 189 and is reproduced at Pet. App. 1a-43a. The Illinois Supreme Court's order denying Illinois Central's petition for appeal is not published and is reproduced at Pet. App. 44a.

JURISDICTION

The order of the Supreme Court of Illinois was entered on May 29, 2008. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY, OR OTHER LEGAL PROVISIONS

The relevant provision of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51, 53 and 56, are reproduced at Pet App. 45a-48a.

STATEMENT

In *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 157 (2003), the Court decided that a plaintiff with asbestos-related disease may seek compensation for fear of contracting cancer in the future as an element of pain and suffering, subject to an "important reservation": The plaintiff must prove that the alleged fear is "genuine and serious." *Id.* at 158. The Court further noted that, while the question of whether the *Ayers* complainants had met this burden was not before the Court, their evidence of fear, which consisted solely of subjective evidence of concern uncorroborated by objective evidence of actual fear, was "notably thin." *Id.* & n.19. The Court made clear that objective evidence is likely necessary but left open the question of precisely what type of objective evidence a complainant must adduce to satisfy the "genuine and serious" requirement. *Id.* n.18.

The court below departed from the "genuine and serious" requirement of *Ayers*. Specifically, the trial court allowed the jury to award damages for fear of cancer to plaintiffs claiming to suffer from asbestos-

related disease based solely on the same type of subjective evidence the Court correctly characterized in *Ayers* as "notably thin" and likely insufficient. The decision of the court below thus reflects a definition of "genuine and serious" that is at odds with the standard contemplated in *Ayers* and conflicts with the definition adopted by at least one other jurisdiction. *See Seaford v. Norfolk S. Ry. Co.*, 824 N.E.2d 94, 111-12 (Ohio Ct. App. 2004), *rev'd on other grounds*, 835 N.E.2d 717 (Ohio 2005).

This case presents the important question left open in *Ayers*: whether plaintiffs with asbestos-related disease can seek damages for fear of future cancer where the only evidence that the fear was "genuine and serious" is the plaintiffs' own subjective testimony of generalized worry, uncorroborated by objective evidence of serious fear.

Statutory Background

Congress enacted FELA as a broad remedial statute to ensure relief for injured railroad employees who work under perilous conditions. *See Urie v. Thompson*, 337 U.S. 163, 181 (1949). Consistent with its remedial nature, FELA lowers certain common-law hurdles that historically prevented recovery for plaintiffs. *See, e.g.*, 45 U.S.C. § 53 (removing contributory negligence as a bar to recovery).

Nonetheless, railroad employers are not insurers of an employee's welfare under FELA. *See Inman v. Baltimore & Ohio R.R.*, 361 U.S. 138, 140 (1959). Liability is predicated on proof that the railroad's negligence caused injury to the employee. Absent express statutory departures from the common law, the requisite negligence under FELA is founded on

the common-law concepts of negligence "as established and applied in the federal courts." *Urie*, 337 U.S. at 174; see also *Norfolk & W. Ry. v. Liepelt*, 444 U.S. 490, 493 (1980) ("It has long been settled that questions concerning the measure of damages in an FELA action are federal in character."). The scope of FELA is "a federal question, not varying in accordance with differing conceptions of negligence applicable under state and local laws." *Urie*, 337 U.S. at 174. Indeed, one of the purposes of FELA was to "create uniformity throughout the Union" with respect to the "financial responsibility of railroads for injuries to their employees." H.R. Rep. No. 60-1386, at 3 (1908). Uniformity is vital in light of the wide latitude FELA plaintiffs have to select a forum. *See* 45 U.S.C. § 56.

To ensure uniformity, guidance from this Court is essential to the proper administration of FELA. In the absence of express statutory provisions, the Court accords "great weight" to evolving common-law principles in delineating the unspecified bounds of recover under FELA. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 544 (1994).

Because the text of FELA is silent on the issue raised in this petition, the issue must be resolved based on evolving principles of common law adapted to the circumstances of the railroad industry. *Id.* at 555-56. Although the Court held in *Ayers* that a plaintiff with asbestos-related disease can recover damages for fear of cancer only on a proper showing that the fear is "genuine and serious" and strongly suggested that this burden requires more than the complainant's own testimony of subjective worry, it expressly left open the question of what quantum and type of objective evidence are necessary to

establish a genuine and serious fear. This question leaves a fundamental gap in FELA doctrine that requires immediate resolution.

Factual Background

The plaintiffs below are three former employees of Illinois Central. Each asserted claims against Illinois Central under FELA, claiming that Illinois Central failed to provide a reasonably safe workplace due to their exposure to asbestos on the job. The plaintiffs alleged that they had contracted asbestosis and sought damages.

The plaintiffs first learned that they had contracted asbestosis on April 9, 2003, at a screening for retired railroad workers arranged by plaintiffs' counsel. None of the plaintiffs was diagnosed with asbestosis by his personal treating physician. Likewise, defendant's pulmonologist and radiologist examined each plaintiff and identified no abnormality relating to asbestos and no basis for the diagnosis of asbestosis.

Each plaintiff sought damages for, among other things a claimed concern about the possibility of contracting cancer sometime in the future.[1] None of the plaintiffs, however, presented objective evidence of fear of cancer. Indeed, the only evidence of concern regarding cancer was the plaintiffs' own testimony. And even this subjective testimony describes something less than "serious" fear.

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[1] These plaintiffs were but three of twenty-five party plaintiffs in the underlying action. Under the trial court's case management plan, claims of plaintiffs are to be tried in smaller groupings. The trial of the claims of respondents here was the second trial in the case.

Plaintiff Delbert Copple is 79 years old. At trial, Mr. Copple testified that he is "enjoying retirement" and that he suffered no true symptoms of asbestos-related injury, other than getting "winded" when he climbs stairs or exercises. Pet. App. 49a-50a. He did not testify to any actual "fear" of cancer. Instead, he merely stated, "Well, I'm concerned about it. I'm even worried about it." Pet. App. 51a. But, this "concern" or "worry" has not interfered with his daily life. Pet. App. 51a. He has not seen a psychologist, psychiatrist, or his treating physician for any stress or anxiety over the possibility of contracting cancer, and has requested no medication for stress or anxiety. Pet. App. 51a-52a. Underscoring his lack of any fear, Mr. Copple testified that the majority of information he learned about asbestos potentially causing cancer came from hearing the *trial* testimony of his expert. Pet. App. 52a-53a.

Plaintiff Carl Heinrichsmeyer is 62 years old and testified that he had no injury resulting from his alleged asbestosis. Pet. App. 55a. Although he cannot do as much as used to, he attributed that mainly to diabetes. Pet. App. 55a, 57a. Mr. Heinrichsmeyer has no fear of cancer whatsoever, testifying only that he is uncertain of the future. Pet. App. 54a. He simply said he is worried about taking care of his family in the event he contracts cancer. "Well, right now all my ducks aren't in a row, and I'm going to have to get my life better and have things set up better to take care of my family and what's left. If I'd go, we're not in real good shape right now. It's more of a day to day thing taking care of my future. I need to think about that now." Pet. App. 54a. His concern, however, does not make him "feel bad" or interfere with his daily life. Pet. App.

56a-57a. He has neither sought the advice of a psychologist or psychiatrist concerning any fear of cancer nor taken any medication for stress or anxiety. Pet. App. 56a-57a.

Plaintiff Donald Hyatt is 70 and testified to no fear of cancer at all, and certainly none that was "genuine and serious." Pet. App. 58a. He has never discussed his alleged fear with his treating physician or a psychologist, nor has he taken any stress or anxiety medication. Pet. App. 59a. Mr. Hyatt testified only that he had shortness of breath when he climbs stairs or pushes a lawn mower, symptoms which developed one month before trial and do not relate to Mr. Hyatt's alleged fear of cancer. Pet. App. 60a-62a.

Despite the lack of true evidence of genuine and serious fear, the court below denied Illinois Central's motion for directed verdict. The trial court then compounded this error by issuing the following jury instruction, which strongly suggested that the question of whether plaintiffs' fear of cancer was "genuine and serious" was a foregone conclusion:

> If you decide for the plaintiff . . . on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate him for any of the following elements of damages . . . .
>
> *The genuine and serious fear of cancer experienced and reasonably certain to be experienced in the future.*

Pet App. 63a (emphasis added). In offering this instruction, the Court rejected two proposed instructions offered by Illinois Central. The first: "In order to recover for fear of cancer, a plaintiff must demonstrate that his fear is genuine and serious. This means fear that significantly and detrimentally affects the ability to carry on every day life and work." Pet. App. 64a. The second: "In order to recover for fear of cancer, a plaintiff must prove that it is more probably true than not true that his fear is genuine and serious." Pet. App. 65a.

On June 1, 2006, the jury returned a verdict in favor of Plaintiffs Copple and Hyatt for $220,000 each and Plaintiff Heinrichsmeyer for $167,000. Pet App. 66a-68a. The jury granted all three plaintiffs identical awards ($30,000) for fear of cancer.[2]

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to resolve the conflict over the evidentiary burden an asbestosis plaintiff must meet to establish a "genuine and serious" fear of contracting cancer. The Court in *Ayers* left open the question of the precise type and quantum of evidence a plaintiff must introduce to support a claim for fear of cancer. But consistent with the Court's previous opinions regarding the recovery of emotional distress damages under FELA,

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[2] In the trial of the first grouping of plaintiffs, the plaintiffs presented almost identical evidence of fear of cancer. Pet. App. 68a-76a. But, the Court in that first trial issued an instruction similar to one proposed by Illinois Central in the second trial ("In order to recover for fear of cancer a plaintiff must demonstrate that fear is genuine and serious"), and the jury declined to award damages for fear of cancer. Pet. App. 77a-80a.

the Court made clear that the emotional harm must be "genuine and serious" and supported by objective evidence, not merely the plaintiff's own subjective testimony.

The lower courts are split over what evidence is necessary to show "genuine and serious" fear. Illinois and other jurisdictions have endorsed a standard that effectively eviscerates the "important reservation" the Court imposed in *Ayers* and would allow recovery even on the "notably thin" showing that the Court in *Ayers* considered likely insufficient. At least one other court has applied a stricter standard that is consistent with *Ayers* and would require evidence other than the plaintiff's testimony of generalized concern.

The Court should resolve this conflict and confirm what *Ayers* and other FELA precedent make plain: damages for emotional distress are not recoverable under FELA when supported only by the plaintiff's subjective testimony of generalized concern.

I. The Court Below Ignored This Court's Repeated Admonition That Emotional Distress Claims Under FELA Must Be Supported By Objective Indicia Of Serious Injury.

The Court's emphasis in *Ayers* that fear of cancer must be "genuine and serious" to allow recovery is but the latest admonition by the Court that claims for emotional distress under FELA must be supported by objective evidence of serious injury.

In *Atchison, T. & S.F.R. Co. v. Buell*, 480 U.S. 557 (1987), the Court first confronted the question of whether and to what extent emotional injuries are

compensable under FELA. The Court noted that, to the extent damages for emotional distress may be recoverable under the common law, "severe emotional injury . . . has generally been required," and that "in the great majority of cases allowing recovery the genuineness of the mental disturbance has been evidenced by resulting physical illness of a serious character." *Id.* at 566-67 n.13, 569 n.18.

In *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 550 (1994), the Court held for the first time that damages for emotional distress injuries are recoverable under FELA. The Court nonetheless emphasized that "significant restrictions" on the recovery of such damages are in order given the "possibility of fraudulent claims that are difficult for judges and juries to detect." *Id.* at 557. Thus, the Court adopted the "zone of danger" test to limit the scope of cognizable claims, again emphasizing the need for objective indicia to separate meritorious from invalid claims. *Id.* at 554-55.

In *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 433-34 (1997), the Court again pointed to the special difficulty of distinguishing meritorious claims of emotional distress from fraudulent claims. There, the plaintiff sought to recover damages for fear of cancer due to his extensive exposure to asbestos dust on the job, notwithstanding that he suffered no asbestos-related disease. The Court held that mere exposure to asbestos is not a "physical impact" that would satisfy *Gottshall*'s zone of danger test. Importantly, concurring in the judgment, Justice GINSBURG observed that, even had the *Gottshall* test been satisfied, Buckley's claim would fail because he "did not present objective evidence of severe emotional distress." *Id.* at 445 (GINSBURG,

J., concurring with the judgment in part and dissenting in part). "Buckley testified at trial that he was angry at Metro-North and fearful of developing an asbestos-related disease. However, he sought no professional help to ease his distress, and presented no medical testimony concerning his mental health. Under these circumstances, Buckley's emotional distress claim fails as a matter of law." *Id.*

Buell, *Gottshall* and *Buckley* thus share a common thread. Regardless of the applicability of the various threshold tests that winnow the class of potential plaintiffs, damages for emotional distress are recoverable only where the emotional injury complained of is serious and supported by more than complainant's subjective testimony.

The Court's decision in *Ayers* picks up this thread and carries it forward. Respecting the threshold qualification for recovery of "fear" damages, the Court in *Ayers* distinguished a plaintiff with asbestosis from the disease-free plaintiff in *Buckley*. In that circumstance, the threshold test is satisfied and recovery is allowed. Still, as made clear in *Buell*, *Gottshall*, and *Buckley*, even where the plaintiff meets the threshold test for recovery, "[i]t is incumbent upon such a complainant . . . to prove that his alleged fear is 'genuine and serious.'" *Ayers*, 538 U.S. at 158.

The Court did not expressly decide what evidence would be necessary to show a "genuine and serious" fear of cancer, *id.* at 158 n.17, but made clear that some form of objective testimony likely is necessary. Specifically, the Court highlighted the "notably thin" proof that the plaintiffs had offered:

> [O]ne of the claimants did not testify to having any concern about cancer;

> another testified that he was more afraid of shortness of breath from his asbestosis than of cancer. Others testified to varying degrees of concern over developing the disease; no claimant presented corroborative objective evidence of his fear.

Id. at 158, n.18. This proof, noted the court, "might well have succumbed to a straightforward sufficiency of the evidence objection, had Norfolk so targeted its attack." *Id.* at 158.

Importantly, Justice BREYER in dissent offered a standard that the Court considered consonant with its "genuine and serious" standard. "I would, consistent with the sense of the common law, permit recovery where the fear of cancer is unusually severe—where it significantly and detrimentally affects the plaintiff's ability to carry on with every day life and work." *Id.* at 187 (BREYER, J., dissenting). The majority in *Ayers* declined to adopt this definition of "genuine and serious" given that it "was not aired in the trial court or in this Court," *id.* at 158 n.18, but nonetheless viewed the standard as a mere "elaboration" on the "genuine and serious" requirement the Court imposed. Indeed, such a standard, which likely would require "medical testimony concerning [the complainant's] mental health" or at least that the complainant had "sought . . . professional help" to deal with his fear, is consistent with the view previously expressed by Justice GINSBURG, the author of the Court's opinion in *Ayers*. *Buckley*, 521 U.S. at 445 (GINSBURG, J., concurring with the judgment in part and dissenting in part).

The proof offered by the plaintiffs here falls well short of this standard. None of the plaintiffs offered more than subjective testimony of "worry" or "concern." None offered corroborating objective evidence that fear of cancer significantly or detrimentally affected his day-to-day life. *Cf. Ayers*, 538 U.S. at 158 n.17. None offered medical testimony regarding the severity of the fear. *Cf. Buckley*, 521 U.S. at 445 (GINSBURG, J., concurring with the judgment in part and dissenting in part). Under this Court's prior opinions, this proof was plainly insufficient and should have been rejected.

The court below only compounded the error of allowing the question of fear to be presented to the jury on this proof by submitting an instruction that strongly suggested that a professed fear of cancer is *ipso facto* genuine and serious. In *Ayers*, this Court emphasized that the adverse financial consequences on defendants identified by Justices KENNEDY and BREYER in dissent would be avoided, in part, through proper jury instruction. "[T]he dissents largely disregard . . . the verdict control devices available to the trial court. These include, on a defendant's request, a charge that each plaintiff must prove any alleged fear to be genuine and serious, a review of the evidence for sufficiency, and particularized verdict forms." *Ayers*, 538 U.S. at 159 n.19.

The Court below effectively deprived Illinois Central of a key "verdict control device," a proper jury instruction.[3] Specifically, the court below instructed the jury as follows:

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[3] Other jurisdictions have refused to instruct the jury on the "genuine and serious" standard altogether. *See Hedgecorth v.*

> If you decide for the plaintiff . . . on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate him for any of the following elements of damages . . . .
>
> *The genuine and serious fear of cancer experienced and reasonably certain to be experienced in the future.*

Pet App. 63a (emphasis added). The implication of this instruction is that a fear of cancer is necessarily genuine and serious. The Court's decision in *Ayers* makes clear that compensable fear of cancer is not a foregone conclusion.

Neither of Illinois Central's proposed instructions suffers this defect. Had the trial court used either of them, the jury may well have declined to award damages for fear of cancer. Of note, in the trial of the first grouping of plaintiffs in this action, the Court issued a proper instruction: "In order to recover for fear of cancer a plaintiff must demonstrate that fear is genuine and serious." Having been properly instructed, the jury declined to award damages for fear of cancer on evidence almost identical to that adduced by the respondents here. Pet. App. 77a-80a.

Union Pacific R.R. Co., 210 S.W.3d 220, 226-29 (Mo. Ct. App. 2007) (affirming trial court's refusal to give separate instruction on definition of "genuine and serious"); *Hensley v. CSW Transp., Inc.*, No. E2007-00323-COA-R3-CV, 2008 WL 683755, *16 (Tenn. Ct. App. Mar. 14, 2008) (citing *Hedgecorth* in support of same result) Pet. App. 81a-119a.

II. THE JUDGMENT OF THE COURT BELOW DEEPENS THE EXISTING CONFLICT REGARDING THE DEFINITION OF "GENUINE AND SERIOUS."

The Courts applying Ayers have diverged over the definition of "genuine and serious." In *Seaford v. Norfolk S. Ry. Co.*, 824 N.E.2d 94, 111-12 (Ohio Ct. App. 2004), *rev'd on other grounds*, 835 N.E.2d 717 (Ohio 2005), the Court of Appeals of Ohio applied *Ayers* and properly ruled that a plaintiff's "worry" does not equate to "fear" and does not rise to the level of being "serious." There, the plaintiff testified regarding the possibility of future cancer, "I worry about it and the family is concerned about it." The court explained that, under *Ayers*, compensable fear requires more than testimony of "concern" or "worry" and reversed the trial court's denial of defendant's motion for directed verdict. *Id.*

Here, the Illinois courts allowed recovery on proof almost identical to that found insufficient in *Seaford*.[4] Plaintiff Copple, for example, testified that he was "concerned" and even "worried" about contracting cancer, testimony indistinguishable from the plaintiff's testimony in *Seaford*. Plaintiffs Heinrichsmeyer and Hyatt fare even more poorly under that standard.

The Court should grant certiorari to resolve this conflict, especially given the need for uniformity under FELA. H.R. Rep. No. 60-1386, at 3 (1908) (noting that one of the purposes of FELA was to

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[4] Tennessee likewise would allow recovery in the absence of objective evidence of "genuine and serious" fear. *See, e.g.*, *Hensley*, 2008 WL 683755, *15-*17 (allowing recovery on testimony of "anxiety").

"create uniformity throughout the Union" with respect to the "financial responsibility of railroads for injuries to their employees"). Moreover, this particular conflict creates a powerful incentive for forum shopping, a key concern under FELA given the latitude that FELA plaintiffs enjoy in selecting a forum. *See* 45 U.S.C. § 56.

III. THE RULE ADOPTED BY THE COURT BELOW THREATENS THE AVAILABILITY OF FUNDS FOR COMPENSATION OF LEGITIMATELY INJURED ASBESTOS CLAIMANTS.

The Court should grant certiorari to confirm and clarify the limited conditions under which damages for fear may be awarded to prevent those most severely injured by asbestos from being denied just compensation.

In *Ayers*, Justices KENNEDY and BREYER demonstrated in dissent that the rule adopted by the Court could threaten the availability of funds for claimants with the most debilitating and severe asbestos-related injuries. Justice KENNEDY noted that the latency period for mesothelioma, the most severe and debilitating asbestos-related cancer, is decades. *Ayers*, 538 U.S. at 168 (KENNEDY, J., dissenting) (citing, *inter alia*, A. Churg & F. Green, Pathology of Occupational Lung Disease 350 (2d ed. 1998) ("The latency period for asbestos-induced mesothelioma is long, with a mean value of 30 to 40 years")). Thus, the recovery of damages for questionable "fear" claims could deprive future mesothelioma sufferers from just compensation. *Id.* Justice KENNEDY demonstrated that this fear is not hypothetical:

> Asbestos litigation has driven 57 companies, which employed hundreds of thousands of people, into bankruptcy, including 26 companies that have become insolvent since January 1, 2000. See RAND Institute for Civil Justice, S. Carroll et al., Asbestos Litigation Costs and Compensation: An Interim Report 71 (2002). With each bankruptcy the remaining defendants come under greater financial strain, see Edley & Weiler, Asbestos: A Multi-Billion-Dollar Crisis, 30 Harv. J. Legis. 383, 392 (1993); M. Plevin & P. Kalish, What's Behind the Recent Wave of Asbestos Bankruptcies? 16 Mealey's Litigation Report: Asbestos 35 (Apr. 20, 2001), and the funds available for compensation become closer to exhaustion, see Schuck, The Worst Should Go First: Deferral Registries in Asbestos Litigation, 15 Harv. J.L. & Pub. Pol'y 541, 547 (1992).

Id. at 169 (internal record citation omitted); *see also id.* at 186-87 (BREYER, J., dissenting).

The Court in *Ayers* acknowledged these concerns. To address them, the Court imposed the "important reservation" that any claim of fear be supported by evidence of "genuine and serious" injury and identified proper jury instruction as a "verdict control device" that would prevent unjust awards.

For these checks to be effective, however, they must be enforced, and the Court below did not do so. The Court below disregarded the "genuine and serious" standard. If that standard is to mean

anything, the question of awarding "fear" damages should not be submitted to the jury on such thin proof. Should that rule prevail more broadly, the dire consequences identified by the *Ayers* dissents may well come about. Moreover, the instruction offered by the Court is far from the "verdict control device" envisioned by the Court. It more fairly can be described as a "verdict enhancing device," as it strongly suggests that *any* concern over the possibility of contracting cancer in the future is necessarily "genuine and serious" fear.

This Court should grant certiorari to clarify the type of quantum of proof a plaintiff must adduce to recover damages for fear of cancer. And whatever standard is adopted, the Court should provide guidance as to the type of jury instruction that is appropriate to control against excessive and unjust verdicts.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 27, 2008

APPENDIX A

DECISION OF THE APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT FILED JANUARY 22, 2008

[Filed Jan 22, 2000 Louis E. Costa, Clerk Appellate Court, 5th Dist]

NO. 5-06-0618

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

XON BLACKBURN *et al.*, Plaintiffs, and DELBERT COPPLE, CARL HEINRICHSMEYER, and DONALD HYATT, Plaintiffs-Appellees, v ILLINOIS CENTRAL RAILROAD COMPANY, Defendant-Appellant	Appeal from the Circuit Court of Marion County. No. 04-L-25 Honorable Patrick J. Hitpas, Judge, presiding.

JUSTICE SPOMER delivered the opinion of the court.

The defendant, Illinois Central Railroad Company (the Railroad), appeals from the order of the circuit court of Marion County that entered a judgment on jury verdicts in favor of plaintiffs Delbert Copple, Carl Heinrichsmeyer, and Donald Hyatt (the plaintiffs). For the reasons set forth below, we affirm the judgment of the circuit court.

FACTS

The plaintiffs are among a group of 24 plaintiffs who sued the Railroad for claims arising under the Federal Employers' Liability Act (FELA) (45 U.S.C. §51 *et seq.* (2000)), whereby they alleged they were injured when they were exposed to asbestos, diesel exhaust, and other dangerous products during the course of their employment. The plaintiffs claimed, *inter alia*, that the Railroad negligently failed to provide them with a reasonably safe place to work. The Railroad filed a motion to sever the cases for trial, and the circuit court granted the motion in part by consolidating the plaintiffs' cases into groups of four for trial. The plaintiffs' cases were the second group to be tried together before a jury. The other plaintiff in their group did not participate in the trial for reasons unrelated to this appeal. The verdicts in the first group's trial were previously affirmed on appeal. *Xon Blackburn v. Illinois Central R.R. Co.*, No. 5-06-0417 (2007) (unpublished order under Supreme Court Rule 23 (166 Ill. 2d R. 23)).

Delbert Copple was 79 years old at the time of the trial. Mr. Copple worked for the Railroad continuously from 1950 to 1986 as a stockman and laborer in various facilities in and around Centralia.

He testified that in his work, he was exposed to asbestos-containing products, including asbestos sleeves, gaskets, brake shoes, and firebrick. Carl Heinrichsmeyer was 62 years old at the time of the trial. Mr. Heinrichsmeyer worked for the Railroad from 1963 until 1982, also in and around Centralia. He worked at various times as a stockman, chauffeur, and store clerk, and he testified that he also handled asbestos sleeves and gaskets. Donald Hyatt was 70 years old at the time of the trial. Mr. Hyatt worked for the Railroad from 1969 to 1999, beginning at the facility in Champaign. From 1970 until 1984, Mr. Hyatt was responsible for maintaining water and steam lines at various facilities from Champaign to Effingham. During his employment, Mr. Hyatt was exposed to asbestos piping and boiler insulation.

In 2003, the plaintiffs attended a screening set up by the attorneys working for their union. After the screening, Dr. Alvin Schonfeld diagnosed the plaintiffs with asbestosis, which is defined as the scarring of the lungs created by asbestos fibers. At the trial, Dr. Schonfeld testified that the plaintiffs' asbestos exposure during their employment with the Railroad caused, in whole or in part, their injuries.

After a lengthy trial at which each side presented numerous lay and expert witnesses, the jury returned verdicts in favor of the plaintiffs, awarding $220,000 in damages to Mr. Copple, $167,000 to Mr. Heinrichsmeyer, and $220,000 to Mr. Hyatt. The circuit court denied the Railroad's motions for a directed verdict, made at the close of the plaintiffs' evidence and again at the end of the trial. The circuit court denied the Railroad's posttrial motions and entered a finding pursuant to Illinois Supreme

Court Rule 304(a) (210 Ill. 2d R. 304(a)). The Railroad filed a timely notice of appeal. We will set forth additional facts from the record as needed to explain our resolution of each issue on appeal.

ANALYSIS

1. Instructing the Jury on the Fear of Cancer

The Railroad argues that the circuit erred in instructing the jury on the fear of cancer. The Railroad's argument on this issue is twofold. First, the Railroad argues that the circuit court erred in refusing to instruct the jury that in order to award damages for the fear of cancer, the jury must find that the fear must significantly and detrimentally affect the ability to carry on everyday life and work. Second, the Railroad argues that there was insufficient evidence presented to warrant a jury instruction on the fear of cancer as an element of damage for each plaintiff. We will address each argument in turn.

The United States Supreme Court has held that an asbestosis claimant, upon demonstrating a reasonable fear of cancer stemming from the claimant's existing disease, can recover for that fear as a part of asbestosis-related pain-and-suffering damages in a suit brought under FELA. *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 157, 155 L. Ed. 2d 261, 281, 123 S. Ct. 1210, 1223 (2003). However, it is incumbent upon the claimant to prove that his alleged fear is genuine and serious. *Ayers*, 538 U.S. at 157, 155 L. Ed. 2d at 281, 123 S. Ct. at 1223. In this case, the circuit court instructed the jury separately regarding each plaintiff as follows:

"If you decide for the plaintiff *** on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate him for any of the following elements of damages proved by the evidence to have resulted, in whole or in part, from the negligence of the defendant, taking into consideration the nature, extent[,] and duration of the injury.

***

The genuine and serious fear of cancer experienced and reasonably certain to be experienced in the future."

The circuit court refused the Railroad's proposed instruction, which stated: "In order to recover for fear of cancer, a plaintiff must demonstrate that his fear is genuine and serious. This means fear that significantly and detrimentally affects the ability to carry on everyday life and work." This proposed instruction was modeled after Justice Breyer's partial dissent in *Ayers*, in which he stated that he would "permit recovery where the fear of cancer is unusually severe—where it significantly and detrimentally affects the plaintiff's ability to carry on with everyday life and work." 538 U.S. at 187, 155 L. Ed. 2d at 300, 123 S. Ct. at 1239 (Breyer, J., concurring in part and dissenting in part). The Railroad argues that Justice Breyer is proposing a definition of "genuine and serious." However, he is in fact, proposing a more stringent standard than that handed down by the majority in *Ayers*. Accordingly, the circuit court did not err when it rejected the Railroad's tendered instruction and instructed the jury in accordance with the majority opinion in *Ayers*.

We now turn to the issue of whether the circuit court erred in determining that there was sufficient evidence to support a jury instruction on the fear of cancer regarding each plaintiff. Our review of the record reveals that Dr. Douglas Pohl testified that asbestos is carcinogenic and that a person who has been exposed to asbestos is at an increased risk of cancer. Dr. Schonfeld also testified that asbestosis sometimes causes cancer. Mr. Copple testified that he is concerned, even worried, about the prospect of developing cancer. Mr. Heinrichsmeyer testified that he is concerned about taking care of his family in the event that he contracts the disease. Mr. Hyatt testified that cancer is on his mind all the time and that he had pneumonia in January and thought he might have been contracting cancer at that time. We find this evidence sufficient to support the circuit court's decision to instruct the jury that it could award each plaintiff damages for the fear of cancer should it find that fear to be genuine and serious.

2. Denial of the Motion for a New Trial on the Issue of Damages or a Remittitur

a. *Standard of Review*

The Railroad also argues that the circuit court erred in denying its motion for a new trial on the entire damages award and in denying its alternative motion for a remittitur on the future-medical-expense and pain-and-suffering awards. When we review a circuit court's ruling on a motion for a new trial on the issue of compensatory damages, the standard of review is whether the verdict is against the manifest weight of the evidence. *Hollowell v. Wilder Corp. of Delaware*, 318 Ill. App. 3d 984, 990

(2001) (citing *Maple v. Gustafson*, 151 Ill. 2d 445, 454 (1992)). "A verdict is against the manifest weight when it is arbitrary, unreasonable, or not based upon any evidence." *Hollowell*, 318 Ill. App. 3d at 990 (citing *Maple*, 151 Ill. 2d at 454). The standard of review for the circuit court's ruling on a motion for a remittitur is whether the circuit court abused its discretion. *Hollowell*, 318 Ill. App. 3d at 991.

In addition to the standard of review, it is important to note several principles that are applicable when reviewing a damages award. "The determination of damages is a question reserved to the trier of fact, and a reviewing court will not lightly substitute its opinion for the judgment rendered in the trial court." *Richardson v. Chapman*, 175 Ill. 2d 98, 113 (1997). "An award of damages will be deemed excessive if it falls outside the range of fair and reasonable compensation or results from passion or prejudice, or if it is so large that it shocks the judicial conscience." *Richardson*, 175 Ill. 2d at 113. "When reviewing an award of compensatory damages for a nonfatal injury, a court may consider, among other things, the permanency of the plaintiff's condition, the possibility of future deterioration, the extent of the plaintiff's medical expenses, and the restrictions imposed on the plaintiff by the injuries." *Richardson*, 175 Ill. 2d at 113-14.

b. *The Identical Awards*

Before turning to our analysis of the specific items of damages awarded to each of the plaintiffs, we recognize that in several places in the Railroad's brief, the Railroad points to the fact that the jury made identical awards to the plaintiffs for the fear of

cancer, disability, and pain and suffering and identical awards to Mr. Copple and Mr. Hyatt for future medical expenses. The Railroad directs this court's attention to that fact in support of its arguments that the trials should have been severed; that the jury should have been instructed on a definition of "genuine and serious" in relation to the fear of cancer; and that without evidence of life expectancy the jury should not have been instructed to consider, in assessing the awards for future medical expenses, how long the plaintiffs are likely to live. Although we have analyzed these specific issues in other parts of this opinion and found no error, we find it provident to consider whether the identical awards, in and of themselves, would necessitate a new trial on damages.

We find no authority in Illinois, and the Railroad points to none, that stands for the proposition that identical awards, in and of themselves, are reversible error. In light of this, we have examined how this issue has been handled by other jurisdictions. In so doing, we were persuaded by the reasoning of the Kansas Supreme Court, which stated as follows:

> "The '["]*only* standard for evaluation is such *amount* as reasonable persons estimate to be fair compensation for the injuries suffered.["]' (Emphasis added.) *Morris v. Francisco*, 238 Kan. [71,] 77-78[, 708 P.2d 498, 503-04 (1985)] (quoting *Ratterree v. Bartlett*, 238 Kan. [11,] 23[, 707 P.2d 1063, 1072 (1985)]). There is no per se rule which discredits identical awards, and there is no provision in current

> law for comparison of one plaintiff's recovery with another's to serve as the basis for overturning a jury's verdict." *Kuhl v. Atchison, Topeka & Santa Fe Ry. Co.*, 250 Kan. 332, 344, 827 P.2d 1, 9 (1992).

The Kansas Supreme Court went on to explain that if reasonable persons could estimate the damages of each individual plaintiff to be a fair compensation for the injuries suffered, without comparing them to each other, then the identical awards should be upheld. *Kuhl*, 250 Kan. at 344, 827 P.2d at 9. Similar conclusions have been reached by the Maine Supreme Court, as well as the United States Court of Appeals for the Ninth Circuit. See *Harris v. Soley*, 2000 ME 150, ¶27, 756 A.2d 499, 508 (2000); *Lambert v. Ackerley*, 180 F.3d 997, 1011 (9th Cir. 1999). We find this analysis persuasive for our purposes here, especially in light of the fact that all three plaintiffs were similarly diagnosed with asbestosis and had similar physical manifestations of this disease, presenting with symptoms of shortness of breath and some limitations on their levels of exertion. Although Mr. Copple was 79 years old at the time of the trial, while Mr. Heinrichsmeyer was 62 and Mr. Hyatt was 70, a reasonable jury could conclude that because longevity is uncertain, similar awards for future damages were justified based on the similarity of their asbestosis-related conditions. Accordingly, we decline to substitute our judgment for that of the jury solely on the basis of identical awards.

c. *Future Medical Expenses*

We begin our analysis of the particular verdicts at issue with the award for future medical expenses. The jury awarded Mr. Copple and Mr. Hyatt each $100,000, and it awarded Mr. Heinrichsmeyer $47,000 for future medical expenses. We cannot say that these awards are against the manifest weight of the evidence or that the circuit court abused its discretion in denying the motion for a remittitur with regard to future medical expenses. Dr. Schonfeld testified that because the plaintiffs were diagnosed with asbestosis, they would need periodic X rays, medical exams, and colonoscopies. Similarly, Dr. Pohl testified that an asbestosis patient must have routine pulmonary testing throughout his life. Mr. Copple testified that he plans to monitor his condition with his family doctor. Mr. Heinrichsmeyer testified that he also plans to monitor his health. Mr. Hyatt testified, without objection, that his doctor told him he would need a chest X ray every year.

The Railroad argues that these verdicts should be reversed because the plaintiffs did not produce evidence of any specific medical expenses that they would incur in the future other than "generic references" to periodic visits to a physician for a chest X-ray. However, "the trier of fact enjoys a certain degree of leeway in awarding compensation for medical costs that, as shown by the evidence, are likely to arise in the future but are not specifically itemized in the testimony." *Richardson*, 175 Ill. 2d at 112. The Railroad also points to the plaintiffs' counsel's statement during closing argument that a "fair figure" for future medical expenses would be $5,000. However, "[a] jury's award of a verdict higher than that requested by counsel does not, by

itself, indicate that the jury acted out of passion or prejudice." *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 250-51 (2006) (quoting *Fedt v. Oak Lawn Lodge, Inc.*, 132 Ill. App 3d 1061, 1072 (1985)).

We find that the amounts awarded fall within a range of fair and reasonable compensation for periodic X-rays, exams, and other diagnostic testing that the evidence shows the plaintiffs will face due to the asbestosis diagnosis. In addition, these amounts are not so large that we can say that they are based on juror passion or prejudice or that they shock the judicial conscience. Accordingly, we will not substitute our judgment for that of the jury. The circuit court did not err in allowing the jury's verdict with regard to future medical expenses to stand.

d. *Pain and Suffering, Disability, and Fear of Cancer*

We now turn to the jury's award to the plaintiffs for pain and suffering and disability and fear of cancer. The jury awarded each of the plaintiffs $15,000 for pain and suffering, $75,000 for disability, and $30,000 for fear of cancer. Dr. Alvin Schonfeld testified that the plaintiff's suffered from asbestosis, a permanent condition, which was caused, in whole or in part, by their employment with the Railroad. Dr. Schonfeld testified that the plaintiffs' complaints of shortness of breath were consistent with his findings of asbestosis and that the plaintiffs were at an increased risk of developing cancer as a result of their exposure to asbestos. Dr. Donald Breyer testified that the plaintiffs' chest X rays contained varying degrees of abnormalities consistent with

asbestosis. Mr. Copple testified that he gets winded when he works out at the gym and when walking up stairs. Mr. Heinrichsmeyer testified that just about every activity makes him short of breath. He testified that he is not able to work the same hours he used to work at his tavern, due to shortness of breath. Although he plays golf, he must use a golf cart. Mr. Hyatt testified that he would have to stop halfway up the stairs due to shortness of breath. Dr. Pohl testified that the plaintiffs' complaints were consistent with his diagnosis of asbestosis. The plaintiffs testified that they experience shortness of breath to varying degrees, and they gave some indication on how this impacts their lives.

In addition to the testimony of the plaintiffs, expert testimony was presented that asbestosis has the very real potential to worsen in the future. In addition, expert testimony was presented regarding the increased risk of cancer, and the plaintiffs testified regarding the concern and worry this caused them. As explained elsewhere in this opinion, the jury was correctly instructed on these elements of damages, and it was within its discretion to assess a monetary value for these noneconomic items of damage. Because we cannot say that the amounts awarded fall outside the range of fair and reasonable compensation or result from passion or prejudice or that the amounts awarded are so large that they shock the judicial conscience, we will not disturb the award. Accordingly, the circuit court did not err when it denied the Railroad's motion for a new trial on damages or a remittitur.

[The following material is nonpublishable under Supreme Court Rule 23.]

3. Instructing the Jury on Negligence and Damages

a. *Standard of Review*

The Railroad argues that the circuit court erred by instructing the jury on the issues of negligence and damages. "A litigant has the right to have the jury clearly and fairly instructed upon each theory which was supported by the evidence." *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 100 (1995) (citing *Ervin v. Sears, Roebuck & Co.*, 65 Ill. 2d 140, 145 (1976)). "However, it is error to give an instruction not based on the evidence." *Leonardi*, 168 Ill. 2d at 100. "The question of what issues have been raised by the evidence is within the discretion of the trial court." *Leonardi*, 168 Ill. 2d at 100. "The evidence may be slight; a reviewing court may not reweigh it or determine if it should lead to a particular conclusion." *Leonardi*, 168 Ill. 2d at 100. "The test in determining the propriety of tendered instructions is whether the jury was fairly, fully, and comprehensively informed as to the relevant principles, considering the instructions in their entirety." *Leonardi*, 168 Ill. 2d at 100.

b. *Instructions on Negligence*

We note that heading "L" in the Railroad's brief includes a statement that the circuit court abused its discretion in instructing the jury regarding the Railroad's negligence. However, the Railroad's brief is devoid of any argument regarding any error the circuit court might have made in instructing the jury on negligence. Pursuant to Illinois Supreme Court

Rule 341(h)(7) (210 Ill. 2d R. 341(h)(7)), points not argued in the appellant's brief are waived. Moreover, even if the Railroad had not waived the issue of the jury instructions on negligence, there is ample evidence in the record upon which the circuit court could base those instructions, as we have explained below with regard to the circuit court's denial of the Railroad's motion for a judgment notwithstanding the verdict on the issue of negligence. Accordingly, the circuit court did not err in instructing the jury with regard to negligence.

c. *Instructions on Future Medical Expenses*

With regard to damages, the Railroad argues that the circuit court abused its discretion when it instructed the jury it could award the plaintiffs damages for future medical expenses. As previously noted with regard to the motion for a new trial on damages, our review of the record reveals that there was enough evidence for the circuit court to so instruct the jury. Dr. Schonfeld testified that because the plaintiffs were diagnosed with asbestosis, they would need periodic X rays, medical exams, and colonoscopies. Similarly, Dr. Pohl testified that an asbestosis patient must have routine pulmonary testing throughout his life. Copple testified that he plans to monitor his condition with his family doctor. Heinrichsmeyer testified that he also plans to monitor his health. Hyatt testified, without objection, that his doctor told him he would need a chest X ray every year. From this testimony, we conclude that there was "some evidence" to warrant a future-medical-expense instruction. See *Mikus v. Norfolk & Western Ry. Co.*,

312 Ill. App. 3d 11, 33 (2000) (holding that expert testimony that future medical treatment is required is sufficient to warrant a future-medical-expense instruction). Accordingly, the circuit court did not err when it instructed the jury that it could award future medical expenses to the plaintiffs.

d. *Instructions on Present Cash Value*

In a related argument, the Railroad argues that the circuit court erred when it instructed the jury that it must reduce any future-medical-expense award to present cash value but failed to instruct the jury on the requisite methods to calculate present cash value. The circuit court instructed the jury on present cash value as follows.

> "In computing the damages arising in the future because of future medical expenses[,] you must determine their present cash value. 'Present cash value' means the sum of money needed now, which, when added to what that sum may reasonably be expected to earn in the future, will equal the amount of the expenses at the time in the future when the expenses must be paid.
>
> Damages for pain and suffering and disability are not reduced to present cash value."

This instruction was taken verbatim from Illinois Pattern Jury Instructions, Civil, No. 34.02 (2006) (hereinafter IPI Civil (2006)). There is no requirement that actuarial or statistical evidence be present to guide the jury in its determination of

present cash value when this instruction is given. See *Robinson v. Greeley & Hansen*, 114 Ill. App. 3d 720, 725 (1983); *Crabtree v. St. Louis-San Francisco Ry. Co.*, 89 Ill. App. 3d 35, 39 (1980). The Railroad does not contest the definition of "present cash value" contained in the instruction, does not claim the jury improperly computed present cash value, and did not submit another formula that it believed better explained the method of arriving at present cash value. See *Robinson*, 114 Ill. App. 3d at 725. We recognize, as did the courts in *Robinson* and *Crabtree*, that actuarial evidence is often helpful to juries in reducing damages to monetary figures. *Robinson*, 114 Ill. App. 3d at 725; *Crabtree*, 89 Ill. App. 3d at 39. However, that evidence could have been presented by the Railroad had it felt that it was necessary. See *Robinson*, 114 Ill. App. 3d at 725; *Crabtree*, 89 Ill. App. 3d at 39. Accordingly, the circuit court did not err in instructing the jury on present cash value.

e. *Instructions on Pain and Suffering and Disability*

The Railroad also argues that the circuit court erred in instructing the jury on pain and suffering and disability. However, as set forth above, we find ample evidence to support the jury's verdicts for the plaintiffs for both of these elements of damage. Accordingly, we find no error in the circuit court's instructions in these areas.

f. *Instructions Regarding the Plaintiff's Longevity*

With regard to the instructions on future damages, the Railroad also takes issue with the circuit court instructing the jury in accordance with IPI Civil (2006) No. 34.01. That instruction provided as follows:

> "If you find that a plaintiff is entitled to damages arising in the future because of injuries, you must determine the amount of these damages which will arise in the future.
>
> If these damages are of a continuing nature, you may consider how long they will continue. If these damages are permanent in nature, then in computing these damages you may consider how long the plaintiff is likely to live."

The Railroad contends it was error to give this instruction without mortality tables in evidence to instruct the jury on how long the plaintiffs are likely to live. However, the Railroad points to no authority, and our research reveals none, that requires those tables to be admitted into evidence prior to instructing the jury that it may consider how long the plaintiff is likely to live in assessing future damages. In fact, IPI Civil (2006) No. 34.04 instructs the jury on the use of mortality tables if and when they are entered into evidence. That instruction states that the jury is only to use mortality tables "in connection with other evidence relating to the probable life expectancy of the plaintiff in this case, including evidence of his occupation, health, habits, and other activities, bearing in mind that some persons live longer and some persons less than the average." IPI Civil (2006) No. 34.04. As is the case with the actuarial data, the Railroad was free to offer

mortality tables into evidence. The circuit court did not err in giving IPI Civil (2006) No. 34.01.

4. Denial of the Motion for a Judgment Notwithstanding the Verdict

a. *Standard of Review*

The Railroad argues that the trial court erred in denying its motion for a judgment notwithstanding the verdict (*n.o.v.*) because the plaintiffs failed to present any evidence that the Railroad acted negligently toward them or that they were injured as a result of any negligent conduct. The Railroad further argues that the plaintiffs failed to offer any evidence of pain, suffering, or loss of a normal life expectancy. To analyze these issues on appeal, we begin with the standard the circuit court must employ in ruling on a motion for a judgment *n.o.v.*, as well as our standard of review. "[A] judgment *n.o.v.* is properly entered in those limited cases where 'all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand.' " *Maple v. Gustafson*, 151 Ill. 2d 445, 453 (1992) (quoting *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967). "Put another way, 'a motion for judgment [notwithstanding the verdict] presents "a question of law as to whether, when all of the evidence is considered, together with all reasonable inferences from it in its aspect most favorable to the plaintiffs, there is a total failure or lack of evidence to prove any necessary element of the [plaintiff's] case" ' " *Blount v. Stroud*, Nos. 1-06-2428, 1-06-2968, slip op. at 9 (September 28, 2007) (quoting *York v. Rush-*

Presbyterian-St. Luke's Medical Center, 222 Ill. 2d 147, 178 (2006) (quoting *Merlo v. Public Service Co. of Northern Illinois*, 381 Ill. 300, 311 (1942))). Appellate courts employ a *de novo* standard of review when reviewing decisions on motions for a judgment *n.o.v. McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 132 (1999).

b. *Liability*

With regard to the Railroad's argument that the circuit court erred in denying its motion for a judgment *n.o.v.* because the plaintiffs failed to present evidence on the issue of liability, FELA provides as follows:

> "Sec 1 of [FELA] makes the carrier liable in damages for any injury or death 'resulting in whole or in part from the negligence' of any of its 'officers, agents, or employees.' *** At common law the duty of the employer to use reasonable care in furnishing his employees with a safe place to work was plain. [Citation.] That rule is deeply engrained in federal jurisprudence. [Citations] *** [I]t is a duty which becomes 'more imperative' as the risk increases. *** It is that rule which obtains under [FELA]." *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 352-53, 87 L. Ed. 1444, 1447, 63 S. Ct. 1062, 1063-64 (1943).

The most basic question for the court in every FELA case is "whether the proofs justify with reason

the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 506, 1 L. Ed. 2d 493, 499, 77 S. Ct. 443, 448 (1957). The quantum of evidence necessary to support a jury verdict of liability in a FELA case is "much less than in an ordinary negligence case." *Lewis v. Cotton Belt Route-St. Louis Southwestern Ry. Co.*, 217 Ill. App. 3d 94, 112 (1991). That causes other than employer negligence have played a role in the plaintiff's injury does not preclude a finding of negligence against the employer. *Rogers*, 352 U.S. at 506, 1 L. Ed. 2d at 499, 77 S. Ct. at 448.

Our review of the record on appeal leaves no doubt that the plaintiffs submitted evidence from which the jury could determine that the Railroad knew or should have known that the plaintiffs were exposed to harmful levels of asbestos during their employment and that they were injured as a result of this exposure. Without objection, the plaintiffs introduced exhibits that indicated that the Railroad was aware of the risks of asbestos exposure as early as the mid-1930s, that asbestos was dangerous whether workers handled it themselves or were only near others using it, and that certain safety precautions could lessen those risks. Lyndle Burton, the Railroad's manager of industrial hygiene, acknowledged that, from an industrial hygiene perspective, a failure to implement the safety precautions recommended in the exhibits was unreasonable based on the knowledge reflected in the exhibits that asbestos is dangerous.

Charles Garrett, the Railroad's senior risk mitigation officer, testified that he investigates

claims against the Railroad for lung injuries from substances such as asbestos. He testified that the Railroad's discovery responses included statements that it did not issue any written warnings to its employees about the hazards of asbestos exposure, and the Railroad did not deny that asbestos was used in the workplaces where the plaintiffs were employed. The plaintiffs testified at length and in detail regarding how they were exposed to asbestos materials and they were present when asbestos dust was in the air in the various facilities where they worked. The plaintiffs also testified that the Railroad did not provide them with respirators to filter out the dust, did not tell them that exposure to asbestos dust might be dangerous, and did not advise them to take any safety precautions, such as wetting down the dust, when working with or around asbestos.

The plaintiffs' expert witness, Dr. Michael Ellenbecker, a certified industrial hygienist, testified that the medical and surgical section of the Association of American Railroads, of which the Railroad was a member, recognized as early as 1937 that asbestos used in the Railroad's workplaces posed a hazard. He stated that the railroad industry recognized the concept of bystander exposure to asbestos as early as 1940 and that the plaintiffs were exposed to very high and unsafe levels of asbestos during their employment with the Railroad, even though methods to reduce exposure to asbestos were available. He concluded that the Railroad did not provide the plaintiffs with a reasonably safe place to work. There is no doubt from our review of the record that the plaintiffs produced sufficient

evidence of FELA liability to withstand a motion for a judgment *n.o.v.*

c. *Damages*

In addition, we cannot say that the plaintiffs failed to produce sufficient evidence of damages to withstand a motion for a judgment *n.o.v.* As explained above, we find ample evidence in the record to support the jury's verdicts. Because the plaintiffs put forth some evidence for each element necessary to prove their FELA claims, we find that the circuit court did not err in denying the Railroad's motion for a judgment *n.o.v.*

5. Denial of the Motion to Sever

The Railroad argues that the circuit court erred by failing to sever the plaintiffs' trials because their claims lacked the requisite commonality to justify consolidation. Specifically, the Railroad contends that the plaintiffs were allegedly exposed to asbestos when they worked at different facilities, during different time periods, for markedly different durations, in different trades, through the use of different products. "An action may be severed, and actions pending in the same court may be consolidated, as an aid to convenience, whenever it can be done without prejudice to a substantial right." 735 ILCS 5/2-1006 (West 2004). The trial court has broad discretion in matters of consolidation and severance, which discretion is to be guided by considerations of convenience and the rights of the parties. *Needy v Sparks*, 51 Ill. App. 3d 350, 355-56

(1977). "Where separate causes are of the same nature, involve the same or like issues[,] and depend largely upon the same evidence, consolidation is not an abuse of discretion." *Ad-Ex, Inc. v. City of Chicago*, 247 Ill. App. 3d 97, 103 (1993). Indeed, in at least one instance, this court has found consolidation proper with regard to three personal injury claims and one wrongful death claim where the jury was properly instructed, the evidence was not confusing or misleading, and the record did not show any prejudice to the defendant. *Pickering v. Owens-Corning Fiberglass Corp.*, 265 Ill. App. 3d 806, 811-12 (1994). "Inherent in the power to consolidate is the authority to integrate evidence at a joint trial in the interest of convenience and economy." *Pickering*, 265 Ill. App. 3d at 8.11.

We agree with the plaintiffs that the trial of their cases together was not unfair to the Railroad. The evidence regarding the Railroad's knowledge of the hazards of asbestos in the workplace and the available safety measures for reducing those risks was the same for all three plaintiffs. The Railroad's knowledge of these hazards was not dependent upon location, so the fact that the plaintiffs may have worked at different locations is not dispositive of the severance issue. We recognize that the jury had to assess the damages issues for each of the three plaintiffs separately. However, we find that the trial court balanced this factor with the need for convenience in the administration of justice and determined that the jury could handle the separate damages of three or four plaintiffs at the same time without causing substantial prejudice to the Railroad. The jury was properly instructed that it was to determine the cases of each plaintiff

separately on its own merits. We find that the decision to allow a consolidated trial of three plaintiffs was not an abuse of discretion.

6. Denial of Motion for Leave to File Third-Party Complaint for Contribution

On March 9, 2006, less than three months before the start of the jury trial under review, the Railroad filed a motion for leave to file a third-party complaint against nine asbestos manufacturers and one insurance company. In the motion, the Railroad alleged that it should be allowed to file the third-party complaint because "it is necessary to ensure that [the Railroad] does not pay more than its pro rata share of any responsibility it may have for plaintiffs' claimed injuries." The Railroad alleged that it had not filed the motion earlier because it "needed to conduct an investigation with respect to those companies or entities that may be responsible for plaintiffs' claimed injuries." The Railroad blamed its late filing on the plaintiffs, who "did not provide information in response to defendant's discovery requests regarding other lawsuits until August 2005." The Railroad alleged that it "then, at its own considerable expense, traveled to Florida and reviewed those files to obtain copies of all relevant pleadings." On March 15, 2006, the circuit court denied the motion as untimely with regard to the trial of the plaintiffs, although it later granted the motion for future trials.

Although the trial court may allow a FELA defendant to file a third-party complaint for contribution (*Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 162, 155 L. Ed. 2d 261, 284, 123 S. Ct.

1210, 1226 (2003)), the circuit court is justified in exercising its discretion to deny leave to file a third-party complaint when a late filing would delay the underlying trial. *Grimming v. Alton & Southern Ry. Co.*, 204 Ill. App. 3d 961, 977-78 (1990). The appropriate time for the Railroad to have filed its third-party complaint for contribution was within the time for it to file its answer. See *Grimming*, 204 Ill. App. 3d at 977.

In its motion, the Railroad did not assert that when it filed its answer in April 2004, it did not know or have records of the manufacturers providing asbestos products to the facilities at which the plaintiffs worked. When the Railroad filed its answer, it failed to file a request for an extension of time within which to file its third-party complaint. Rather, the Railroad waited until almost two years after it had filed its answer and less than three months before the trial under review to request leave to file a third-party complaint. As in *Grimming*, if the circuit court had granted the Railroad's motion for the trial under review, 10 additional third-party defendants would have been brought into the case, necessarily delaying the trial. The fact that the circuit court granted the motion for subsequent trials substantiates the fact that the circuit court's denial was based on the delay. It was not an abuse of the circuit court's discretion for the court to determine that it was a prejudice to these plaintiffs on the immediate trial docket to grant the motion for leave to file a third-party complaint.

7. Exclusion of Evidence of Absence of Warnings From Asbestos Manufacturers

The Railroad's fourth issue on appeal is that the circuit court erred in granting the plaintiffs' motion *in limine* to exclude evidence that the manufacturers of the asbestos-containing products used in the Railroad's facilities did not include warnings on their packages. The Railroad argues that evidence regarding warnings is relevant to the issue of foreseeability and, therefore, properly admitted. " 'Whether granted or denied, a motion *in limine* itself does not preserve the issue for appellate review.' " *Bergman v. Kelsey*, 375 Ill. App. 3d 612, 635 (2007) (quoting *Sullivan-Coughlin v. Palos Country Club, Inc.*, 349 Ill. App. 3d 553, 561 (2004)). " 'Rather, to preserve an error in the exclusion of evidence, the proponent of the evidence must make an adequate offer of proof in the [circuit] court.' " *Bergman*, 375 Ill. App. 3d at 635 (quoting *Sullivan-Coughlin*, 349 Ill. App. 3d at 561). " 'Failure to make such offer of proof results in waiver of the issue on appeal.' " *Bergman*, 375 Ill. App. 3d at 635 (quoting *Sullivan-Coughlin*, 349 Ill. App. 3d at 561).

Here, as set forth in the Railroad's reply brief, the only offer of proof that the Railroad made concerning warnings on asbestos products was during the video evidence deposition of the plaintiffs' expert industrial hygienist, Michael J. Ellenbecker. During this deposition, the Railroad presented Mr. Ellenbecker with a document that, according to the Railroad, dealt with Kaylo pipe insulation, an insulating product made by Owens-Corning in the 1950s. The Railroad had Mr. Ellenbecker read some writing on the document that stated "non[]irritating to the skin and non[]toxic." We find that, even if evidence of warnings on asbestos products was relevant to the issue of foreseeability, the Railroad failed to lay the

proper foundation for the admission of this evidence within its offer of proof. The offer of proof did not set forth any evidence tending to prove that the Railroad used that particular product, when the Railroad used the product, that anyone at the Railroad saw the statement on the exhibit, or whether the Railroad relied on the statement. Accordingly, it was not an abuse of discretion to exclude the evidence set forth in the offer of proof. We find the issue of admissibility waived for all other direct evidence of warnings on asbestos products, because absent an offer of proof, there is no way to determine whether a proper foundation for the admission of that evidence was established.

8. Sustaining Objection to Recross-Examination of Dr. Pohl on Lack of Warnings

The Railroad also argues that the circuit court erred in sustaining an objection to the Railroad's cross-examination of the plaintiffs' expert, Dr. Douglas Pohl, regarding the absence of warnings on asbestos products until the 1960s, after Dr. Pohl testified to that effect on direct examination. On direct examination, the following colloquy occurred between counsel for the plaintiffs and Dr. Pohl:

> "Q. In 1969, Don Hyatt started working at a job for the *** Railroad where he would remove asbestos pipe covering and reapply it, sometimes make this mud that you've talked about and those sorts of activities. What is your opinion, sir, based upon a reasonable degree of medical certainty as to whether it was generally known by

> 1969 that those types of activities carried a risk of asbestos disease?
>
> A. Of course it was. The warnings were starting to go on products in 1964. So, clearly, industry was well aware of the dangers and they were actually putting warning labels on the products. The problem was and was recognized that if not all the products had the warnings or the products were delivered to the workers without warnings--
>
> Q. Let me interrupt you there, sir."

The Railroad did not object or ask that Dr Pohl's answer be stricken. After the direct examination ended, the Railroad conducted a brief cross-examination of Dr. Pohl with respect to his credentials, his possible bias as a hired expert witness who testifies primarily on behalf of plaintiffs, his lack of specific knowledge of the plaintiffs' specific histories of exposure and medical conditions, and other matters unrelated to the product-warnings issue. On redirect, counsel for the plaintiffs questioned Dr. Pohl only on issues elicited by the Railroad on cross-examination. On recross-examination, the Railroad stated as follows: "One last area, Your Honor. You mentioned, Dr. Pohl, that when you talked about the scientific literature[,] warnings from manufacturers didn't come in until the 1960[]s and early '70[]s–"

At that time, the attorney for the plaintiffs objected on the basis that the questioning violated the circuit courts order *in limine*. The attorney for the Railroad argued that the plaintiffs opened the door to this questioning by eliciting information on the warnings issue on direct. However, he did not

make an offer of proof. From the record, it appears that counsel was going to reiterate what Dr. Pohl had testified to on direct, that manufacturers began to put warnings on their products in the 1960s. We can only guess what the remaining portion of counsel's question was going to be. This, again, highlights the importance of making an adequate offer of proof. "When a party seeks to have a reviewing court determine whether the trial court's evidentiary rulings improperly restricted the examination of a witness, the record must be clear regarding what the witness'[s] testimony would have been." *Holder v. Caselton*, 275 Ill. App. 3d 950, 955 (1995). The purpose and importance of an offer of proof have been described as follows:

> "[O]ffers of proof are designed to eliminate such speculation and not only to give the trial court the opportunity to better understand the nature of the proffered evidence–and thereby reevaluate its prior ruling–but also to give courts of review the opportunity to see precisely the nature of the evidence the appellant complains the trial court improperly excluded." *Holder*, 275 Ill. App. 3d at 955 (quoting *People v. Land*, 241 Ill. App. 3d 1066, 1086 (1993)).

Because the Railroad failed to make an adequate offer of proof at the trial, this court cannot know the exact nature of the evidence the Railroad claims the circuit court erroneously excluded. See *Holder*, 275 Ill. App. 3d at 956. We decline to speculate about what question counsel was attempting to ask Dr. Pohl and what Dr. Pohl's testimony would have been. Accordingly, we have no basis upon which to

conclude that the circuit court erred in excluding the recross-examination of Dr. Pohl.

9. Excluding Evidence of Customs and Practices or Other Companies or Industries

The Railroad argues that the circuit court erred in excluding evidence of customs and practices of other companies or industries in dealing with the dangers associated with asbestos at the time of the plaintiffs' employment. The circuit court granted the plaintiffs' motion *in limine* to exclude this evidence. However, the Railroad did not make any offer of proof regarding this evidence. As explained above with regard to the evidence of the lack of warnings on asbestos-containing products, there is no way for this court to review the propriety of the circuit court's ruling on this issue because there is no way of knowing what the evidence would have shown. Accordingly, we find this issue waived.

10. Allowing Evidence of the Diagnosis of a Nonplaintiff

The Railroad argues that the circuit court erred by allowing evidence of the specific diagnosis of a plaintiff not involved in the trial during the plaintiffs' cross-examination of the Railroad's expert radiologist, Brent Harrison, M.D. On direct examination, Dr. Harrison testified that based on his review of the plaintiffs' chest X rays, they did not truly have the asbestos-related disease with which they had been diagnosed by Dr. Schonfeld. During cross-examination, counsel for the plaintiffs

established that Dr. Harrison had been acquainted with defense counsel for several years. Counsel then stated to Dr. Harrison that he wished to review the diagnoses set forth in Dr. Harrison's reports with regard to other injured claimants referred to Dr. Harrison by counsel for the Railroad. The Railroad objected on the basis of relevance, and the circuit court overruled the objection. The Railroad requested a continuing objection, which the circuit court noted. Counsel for the plaintiffs then proceeded to verify with Dr. Harrison that his reports on several other injured claimants stated, "[T]here is no evidence of active disease and nothing to suggest previous occupational exposure." Dr. Harrison answered each leading question in the affirmative but kept interjecting that there was more in the reports' summaries than counsel was suggesting.

Counsel for the plaintiffs then asked the same question about Dr. Harrison's report on Daniel Hogan, a nonplaintiff associated with a previous trial group in this matter. Dr. Harrison again verified that he had reached the same conclusion–that "there is no evidence of active disease and nothing to suggest previous occupational exposure"–but again interjected that there was more written in Mr. Hogan's summary than counsel for the plaintiffs had read. Counsel then stated, "Right, because Dan Hogan had cancer and had part of his lung removed, isn't that true?" The Railroad then objected, again on the basis of relevance. The circuit court did not rule on this objection, and the questioning continued concerning another claimant.

According to the Railroad, the circuit court should have sustained the Railroad's objection and stricken

the question concerning Mr. Hogan from the record. However, the plaintiffs correctly point out that the Railroad did not properly preserve this error for review because it failed to obtain a ruling on its objection. See *Harris Trust & Savings Bank v. Abraham-Zwirn*, 314 Ill. App. 3d 527, 540 (2000) (citing *People v. Waller*, 67 Ill. 2d 381, 386 (1977)). In addition, we may consider this issue waived pursuant to Illinois Supreme Court Rule 341(h)(7) (210 Ill. 2d R. 341(h)(7)), because the Railroad cites no authority for its position. See also *Piasa Motor Fuels v. Industrial Comm'n*, 368 Ill. App. 3d 1197, 1205 (2006). Accordingly, we find that the Railroad has waived this issue on appeal.

Moreover, "[a] reviewing court will grant reversal based on evidentiary rulings only when the error was substantially prejudicial and affected the outcome of the trial." *Bachman v. General Motors Corp.*, 332 Ill. App. 3d 760, 785 (2002). "The burden is on the party seeking reversal to establish prejudice." *Bachman*, 332 Ill. App. 3d at 785. We do not believe that the Railroad has met its burden to establish such prejudice. The Railroad's contention in this regard is that Mr. Hogan's condition bolstered the plaintiffs' claims of their alleged fear of cancer. However, even absent the question from counsel regarding a nonplaintiff's cancerous condition, the Railroad introduced credible evidence, in the form of expert testimony, that a person with asbestosis is at an increased risk of cancer. Accordingly, we cannot find that the question affected the outcome of the trial, and we decline to reverse the judgment of the circuit court on this basis.

11. Excluding Evidence of Other Medical Conditions of the Plaintiffs

The Railroad also claims that the circuit court erred when it granted the plaintiffs' motion *in limine* to exclude evidence of their medical conditions that were not alleged to be asbestos-related. However, the Railroad fails to cite to the record to direct this court to any offer of proof made by the Railroad at the trial regarding evidence of any of the other medical conditions it sought to have admitted. This is a violation of Illinois Supreme Court Rule 341(h)(7) (210 Ill. 2d R. 341(h)(7)), which requires that the argument portion of the appellant's brief include citation of the pages of the record relied on. In addition, we note that the Railroad's brief incorrectly describes the circuit court's ruling. The circuit court granted the plaintiffs' motion *in limine* to exclude "any reference or evidence that any plaintiff suffered from any disease other than those claimed herein *unless defendant can first lay a proper foundation that the other illness or disease is connected to the plaintiff's currently claimed illness or symptoms*." (Emphasis added.) The circuit court's ruling was a correct reflection of the law. The Illinois Supreme Court has held that such a foundation is necessary before introducing evidence of other injuries. See *Voykin v. Estate of DeBoer*, 192 Ill. 2d 49, 59 (2000). Without an adequate offer of proof, neither the circuit court nor this court has any way of knowing whether the Railroad could establish an adequate foundation for the evidence it sought to introduce or whether expert testimony was necessary to establish the relationship between the plaintiffs' complaints and their other injuries and conditions

See *Voykin*, 192 Ill. 2d at 59. Hence, we find this issue waived with regard to any evidence for which there was no offer of proof and for which the Railroad fails to cite to the record.

Although waived for a failure to cite to the record on appeal, our review of the record establishes that the Railroad did attempt to ask Mr. Hyatt on cross-examination whether he has high blood pressure. The plaintiffs objected, citing the circuit court's order *in limine* which required that a proper foundation be established for the admission of evidence of another medical condition. During a sidebar, the Railroad explained to the circuit court that it wished to ask Mr. Hyatt whether anyone had ever told him his high blood pressure could be attributed to his shortness of breath and whether he was following his doctor's advice about taking medication for high blood pressure. The circuit court asked the Railroad if it had any witness who could attribute high blood pressure to shortness of breath. The Railroad replied: "I don't know, Your Honor. I was just going to ask him if anybody ever told him that." The plaintiffs pointed out that the Railroad had disclosed no expert opinion on the matter. The circuit court sustained the objection. We find that this was proper because the Railroad was unable to establish the requisite foundation under *Voykin*. 192 Ill. 2d at 59.

12. Denying the Railroad's Motion to Quash the Subpoena of Lyndle Burton

The Railroad argues that the circuit court erred by denying the Railroad's motion to quash the plaintiffs' Illinois Supreme Court Rule 237 (210 Ill.

2d R. 237) subpoena, which compelled the testimony of the Railroad's employee, Lyndle Burton. Rule 237(b) provides that the appearance at a trial of a person who at the time of the trial is an officer, director, or employee of a party may be required by serving the party with a notice designating the person who is required to appear. 210 Ill. 2d R. 237(b). "Compelling the appearance of a party at trial is a matter for the sound discretion of the trial court, and the court's power to order a party to appear should only be exercised for a good cause and in such a manner that a party may not be subject to harassment, oppression[,] or hardship." *Pickering v Owens-Corning Fiberglas Corp.*, 265 Ill. App. 3d 806, 816 (1994).

According to the Railroad, compelling Burton's appearance was error because Burton was not hired until 2003 and thus had no relevant information regarding the Railroad's industrial hygiene practices and procedures during the plaintiffs' employment from 1939 to 1979. We note that the plaintiffs did not file a response to the motion to quash and that the transcript of the final pretrial conference, which according to the docket sheet is when the circuit court heard arguments on the motion to quash, is not a part of the record on appeal. Therefore, we have no way of knowing the justification given by the plaintiffs for compelling Burton's attendance at the trial. However, our review of the record reveals that Burton was called as an adverse witness at the trial pursuant to section 2-1102 of the Illinois Code of Civil Procedure (735 ILCS 5/2-1102 (West 2004)). On cross-examination, he testified to his qualifications as an expert witness in the field of industrial hygiene and explained the nature of the field to the jury. He

testified that the purpose of an industrial hygienist is to ensure a safe workplace and that he was the first hygienist to be hired by the Railroad despite the field having been in existence since at least the 1940s.

Burton further testified that he was familiar with the "AAR documents," which is a group of documents that were admitted into evidence without objection. These documents consist of various letters and meeting notes obtained from the Association of American Railroads (the AAR), of which the Railroad is a member. Without objection, counsel for the plaintiffs reviewed these documents with Burton, and based on these documents. Burton opined that the Railroad knew that asbestos could potentially be hazardous in the 1930s. Burton further opined that the Railroad's failure to implement the recommendations set forth in the AAR documents, such as air testing, wetting down asbestos to minimize dust, and the use of respirators, would have been an unreasonable safety practice at the time that these recommendations were issued. Furthermore, Burton explained to the jury the concept of bystander exposure. Based on the foregoing testimony by Burton, we cannot say that the circuit court's order compelling his attendance at the trial pursuant to Illinois Supreme Court Rule 237 was an abuse of discretion. Burton clearly had information relevant to the issues of liability in this action.

13. Prohibiting the Railroad From Cross-Examining Dr. Breyer on the "Gitlin Study"

The Railroad next argues that the circuit court erred when it prohibited the Railroad from cross-examining the plaintiffs' expert, Donald A. Breyer, M.D., concerning the "Gitlin Study." "Decisions of the trial court on the admission of evidence will not be disturbed absent an abuse of discretion." *Bowman v, University of Chicago Hospitals*, 366 Ill. App. 3d 577, 587 (2006). "A court abuses its discretion when no reasonable person would agree with the trial court's decision." *Bowman*, 366 Ill. App. 3d at 587. "In general, cross-examination of an expert witness with material from 'a recognized text or treatise is proper where either the court has taken judicial notice of the author's competence [citation] or, absent concession by the witness, the cross-examiner proves the text or treatise is authoritative [citations].'" *Bowman*, 366 Ill. App. 3d at 587 (quoting *People v. Johnson*, 206 Ill. App. 3d 875, 879 (1990)). "The author's competence is established if the judge takes judicial notice of it[] or if it is established by a witness expert in the subject." *Darling v. Charleston Community Memorial Hospital*, 33 Ill. 2d 326, 336 (1965).

Here, the circuit court granted the plaintiffs' motion *in limine* to exclude "[a]ny reference to a publication by Gitlin, *et al.*, unless defendant can first establish, outside the presence of the jury, an acceptable foundation for reference to the article in the presence of the jury." The only offer of proof made by the Railroad was during the cross-examination of Dr. Breyer, who testified via video evidence deposition. Dr. Breyer testified that he is a diagnostic radiologist and a "B-reader" who is certified by the National Institute of Occupational Safety and Health. As Dr. Breyer explained, a B-

reader conducts side-by-side comparisons of patients' chest X-rays with standard films that reflect varying degrees of exposure to asbestos. Dr. Breyer testified that he conducted B-read examinations of all three plaintiffs' chest X-rays. On each plaintiff's B-read, Dr. Breyer testified to varying degrees of abnormalities consistent with asbestosis.

On cross-examination, the Railroad asked Dr. Breyer if he was familiar with the Gitlin Study. Dr. Breyer testified that he had heard of the study and had read the article about a year before his testimony. Dr. Breyer verified that the article on the Gitlin Study appeared in the Journal of Academic Radiology, which is a peer-reviewed journal. Dr. Breyer admitted that when he was publishing in his academic career, he relied upon various review articles as source material. The Railroad then asked Breyer if the Gitlin Study is the type of article that he would have looked at if he was going to express an opinion or write an article on the same topic. Dr. Breyer answered that he could only say that it is an article in a peer-reviewed journal. Dr. Breyer then explained that it was his understanding that the authors of the Gitlin Study had compared some B-reader findings with their own findings and had concluded that these B-reader radiologists had a higher number of positive findings than they did. Dr. Breyer did not recall the exact figures. The article itself does not appear in the record on appeal.

Based on the foregoing, we cannot say that it was an abuse of discretion to exclude the cross-examination of Dr. Breyer concerning the Gitlin Study. A reasonable person could find that the Railroad's offer of proof did not establish the authors' competence or the authoritative nature of the article.

We recognize that Dr. Breyer admitted that the article was published in a peer-reviewed journal. However, the authors of the article were not even identified, and we decline to hold that proof that a study is published in a peer-reviewed journal establishes, as a matter of law, the requisite foundation. Accordingly, we will not reverse the judgment of the circuit court on this basis.

14. Excluding Testimony Regarding the "Halley Study"

Finally, the Railroad argues that the circuit court erred when it precluded the Railroad from eliciting testimony regarding the "Halley Study." According to the Railroad's brief, the Railroad attempted to elicit testimony regarding the Halley Study from the plaintiffs' industrial hygiene expert, Dr. Michael Ellenbecker, on cross-examination, as well as the Railroad's own industrial hygiene expert, Dr. Francis Weir, on direct examination. Both experts testified via video evidence deposition. Although the Railroad cites to the record where the circuit court's ruling can be found regarding the cross-examination of Michael Ellenbecker, it fails to cite to the ruling regarding Dr. Weir and fails to cite the actual testimony that was stricken from the video evidence depositions of the experts and served as the Railroad's offer of proof. Again, this is a clear violation of Illinois Supreme Court Rule 341(h)(7) (210 Ill. 2d R. 341(h)(7)), and we could consider this issue waived on this basis

Despite the Railroad's clear violation of Rule 341(h)(7), we have scoured the record for the testimony and argument needed to resolve the issue

on appeal. Our review of the record reveals that Dr. Ellenbecker testified on direct examination that he took into consideration a study, entitled the "Millette Study," in rendering his opinion that the plaintiffs were exposed to significant levels of asbestos in the course of their employment with the Railroad. Millette had simulated several activities involving asbestos that were occurring in the railroad industry during the relevant time period and had measured the exposure levels for those activities. On cross-examination, the Railroad asked Dr. Ellenbecker whether he was aware of the Halley Study, a study that reported that an inspector in Huntington, West Virginia, had taken a measurement of exposure at a railroad facility during the mixing of asbestos mud and had determined that there was an acceptable exposure level. Dr. Ellenbecker testified, over the plaintiffs' objection, that he was aware of the study and that, in his opinion, the study reached an erroneous conclusion. At the trial, the circuit court sustained the plaintiffs' objection to cross-examination of Dr. Ellenbecker using the Halley Study, and this testimony was cut from the video that was shown to the jury at the trial.

During the Railroad's case in chief, the Railroad requested that it be permitted to read to the jury the prior testimony of Dr. Weir (from the trial of a prior group of plaintiffs in this cause) due to Dr. Weir's unavailability. During the prior trial, Dr. Weir testified that he had conducted a literature review which included the Halley Study. He then described the report and its findings, explaining that it was published by a public agency. At no time did Dr. Weir testify that he considered the author to be

competent or the study to be authoritative. Upon objection in the prior trial, the Railroad asserted that Dr. Weir had not relied on the Halley Study in forming his opinions and that the Halley Study was being offered as circumstantial proof that the Railroad had knowledge of the study. At the prior trial, the circuit court overruled the objection to this testimony, allowing Dr. Weir's testimony.

The plaintiffs objected to the reading of Dr. Weir's testimony at the trial under review, on the basis of hearsay, and the circuit court overruled the objection. Prior to the circuit court's ruling on the objection, counsel for the Railroad stated, "The Halley material would also have to be excluded." Co-counsel for the Railroad then stated, "We talked about Halley. You already ruled that out in Ellenbecker's testimony, presuming your ruling is the same." Following the circuit court's ruling that the testimony could be read to the jury, the following colloquy between counsel and the circuit court occurred.

> "THE COURT: Okay. Anything else before the jury comes in? You need time to clean that up?
>
> MR. GAVIN [counsel for the plaintiffs]: Yes. I mean I feel like I need to make a record on a lot of this Dr. Weir testimony because there is a lot of stuff in here that–there are pages of discussion about the Halley and stuff.
>
> THE COURT: Okay. You agree to take that out?
>
> MR. KURZ [counsel for the Railroad]: Well, I agree I'll abide by your ruling.

THE COURT: You agree it's coming out?

MR. KURZ: I think it should come in, but I understand your ruling.

THE COURT: Why don't the two or three of you take a few minutes, see what you can excise out of there. If you don't agree, I'll rule.

MR. KURZ: That's fine."

The record reflects that the Railroad read to the jury the testimony of Dr. Weir, excluding his testimony about the Halley Study, without further argument on the issue of its admissibility .

We will first address the circuit court's decision to exclude the Railroad's cross-examination of Dr. Ellenbecker regarding the Halley Study. The Railroad did not obtain Dr. Ellenbecker's concession that the Halley Study was an authoritative source of information in the field of industrial hygiene or that the author of the Halley Study was competent to render the conclusions that were rendered in that study. See *Bowman*, 366 Ill. App. 3d at 587 (quoting *Johnson*, 206 Ill. App. 3d at 879); *Darling*, 33 Ill. 2d at 336. In fact, Dr. Ellenbecker testified to just the opposite. Dr. Ellenbecker testified that the Halley Study reached an erroneous conclusion. In addition, even if Dr. Weir's testimony concerning the Halley Study had been admitted, Dr. Weir did not testify about the authoritative nature of the Halley Study. In fact, the Railroad conceded during Dr. Weir's testimony at the first trial that Dr. Weir's testimony regarding the Halley Study was not offered as a source that Dr. Weir relied upon in reaching his opinions in this matter. According to the Railroad, Dr. Weir's testimony regarding the existence of the

Halley Study was being offered in the first trial only as circumstantial evidence that the Railroad might have had knowledge of its conclusions. Accordingly, we find that the circuit court's ruling was not an abuse of discretion because a reasonable person could reach the same conclusion that the Railroad again failed to lay the requisite foundation to use the Halley Study for the purpose of cross-examination.

We now turn to the exclusion of Dr Weir's testimony about the Halley Study. The circuit court clearly stated that the parties should excise all the testimony that they agreed to excise from Dr. Weir's testimony and that if there was anything they did not agree on, the circuit court would rule. The Railroad then read Dr. Weir's testimony to the jury, excluding his testimony about the Halley Study, without any further argument. Accordingly, we find that the Railroad failed to properly preserve any alleged error on the part of the circuit court in excluding Dr. Weir's testimony on the Halley Study, by stipulating to its exclusion

[The preceding material is non publishable under Supreme Court Rule 23.]

CONCLUSION

For the foregoing reasons, the judgment of the circuit court is affirmed.

Affirmed

WELCH and WEXSTTEN, II, concur.

APPENDIX B

SUPREME COURT OF ILLINOIS DENIAL OF PETITION FOR LEAVE TO APPEAL

SUPREME COURT OF ILLINOIS

THURSDAY, MAY 29, 2008

THE FOLLOWING CASES ON THE LEAVE TO APPEAL DOCKET WERE DISPOSED OF AS INDICATED:

. . .

No. 106053 - Xon Blackburn et al. (Delbert Copple et al., respondents, v. Illinois Central Railroad Company, petitioner). Leave to appeal. Appellate Court, Fifth District. (5-06-0618)

Petition for leave to appeal denied.

APPENDIX C

FEDERAL EMPLOYERS LIABILITY ACT

45 USC § 51

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way

directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases" (approved April 22, 1908) [45 USCS §§ 51 et seq.] as the same has been or may hereafter be amended.

45 USC § 53

§ 53. Contributory negligence; diminution of damages

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act [45 USCS §§ 51 et seq.] to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

45 USC § 56

§ 56. Actions; limitation; concurrent jurisdiction of courts

No action shall be maintained under this act [45 USCS §§ 51 et seq.] unless commenced within three years from the day the cause of action accrued.

Under this act [45 USCS §§ 51 et seq.] an action may be brought in a circuit [district] court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act [45 USCS §§ 51 et seq.] shall be concurrent with that of the courts of the several States.

APPENDIX D

DELBERT COPPLE TRIAL TESTIMONY

Q. Did the railroad ever tell you to go to a doctor periodically to check your health?

A. No.

Q. And then you retired in 1986:

A. Yes.

Q. And you've been enjoying retirement since then?

A. Yes.

Q. Mr. Copple, when did you first find out that you had been injured by your exposure to asbestos on the railroad?

A. Had to go to Mt. Vernon to Dr. Schonfeld in 2003 I believe.

Q. Dr. Schonfeld?

A. Yes.

Q. When you went to see Dr. Schonfeld, had you had an x-rays taken to you knowledge?

A. I can't remember.

Q. Did he talk with you?

A. Yes.

Q. Did he examine you?

A. Yes.

Q. Did he listen to your heart and lungs?

A. Yes.

Q. Did he talk with you about your work?

. . .

A. In Centralia.

Q. I meant more specifically, do you live in a home?

A. Yes.

Q. And how much land do you live on?

A. I think my lot measures about 175 by 175, 150.

Q. What do you do day to day?

A. basically baby-sit or help my wife baby-set. General repairs and things like this around the house.

Q. Do you have any activities that require exertion?

A. I workout, we have got a center there in Centralia.

Q. What do you do there?

A. I walk, and we have various machines, I workout on those.

Q. How is you breathing affected when you exert yourself.

A. You know, you get winded.

Q. As you sat here in this trial in the chair, have you been short of breath?

A. As long as I'm not active I'm not. But I walked up the stairs yesterday morning and I was breathing hard..

Q. Delbert, did you smoke cigarettes in your life?

. . .

Q. So have you read about it prior to the beginning of this trial? Do you understand what I'm saying?

A. No.

Q. Before this trial began, had you done a little bit of reading on it?

A. Yes.

Q. And then, of course, you said you heard about it today?

A. Yes.

Q. Now, how do you feel, Delbert, about the prospect that you may develop one or more of these diseases?

A. Well, I'm concerned about it. I'm even worried about it.

Q. And let's talk a little bit about that. Can you expand on that a little bit more? I mean, how often do you think about it, what affect does it have on your mood or your willingness or desire to do things, that sort of thing?

MR. KURZ: Objection, Your Honor, it calls for a narrative, it's also suggestive.

THE COURT: To the extent that it calls for a narrative, I'll sustain that. I think it should be confined, at best, to question and answer.

Q. (MR. GAVIN CONTINUING) Thank you, Your Honor. Delbert, what effect does this have on your day to day activities?

A. It's on my mind a lot. As far as interfering with my everyday life, it hasn't so far. But I do think about it a lot.

Q. Have you gone to a psychiatrist?

A. No.

Q. Have you gone to a psychologist?

A. No.

Q. Has the doctor been giving you medicine for it?

A. No.

Q. What do you intend to do about monitoring your health in the future?

A. I have an appointment with Dr. Ezpeleta, I think he said it was the 18th of this month, or sorry, April. And I have another appointment in July and we talked about it a little that we'll stay on top of it as best we can he said.

Q. And that will involve going back to him every now and then?

A. Yes, I've got an appointment in July.

Q. Where do you live, Delbert?

. . .

A. No.

Q. Would you recognize him if he walked into the room?

A. I don't know.

Q. You haven't had any discussions with your own doctors, not Dr. Schonfeld, but your own doctors about cancer and the likelihood of developing cancer. You told us you were concerned with -- did I understand you to say a moment ago you knowledge of the potential of cancer, while you've done a little bit of reading, your knowledge really stemmed from the testimony you've heard so far, right?

A. Would you repeat that, sir.

Q. Did I understand you to say that your concerns about cancer and the knowledge you have

about potential for cancer have been stirred up by what you've heard this week?

A. Right, yes.

Q. So it wasn't until you heard Dr. Pohl that you learned a lot of things you did today?

A. Right.

Q. You wife couldn't be here because she's baby-sitting your grandchildren?

A. Just one.

Q. The six year old is in school?

APPENDIX E

CARL HEINRICHSMEYER TRIAL TESTIMONY

Q. How do you feel about – well, what is your understanding of whether you have a risk of developing cancer from your asbestos exposure?

A. What's my understanding?

Q. Yes.

A. After your first day -- what I read I wasn't real happy. My wife can verify that if she needs to. But it makes you wonder. It does. I don't feel bad, but I don't know what's going on in there. And this longevity stuff or whatever words you used, is right there.

Q. Do you have any concern over that?

A. Oh, yeah.

Q. How does your concern or your feelings about it affect you from day to day?

A. Well, right now all my ducks aren't in a row, and I'm going to have to get my life better and have things set up better to take care of my family and what's left. If I'd go, we're not in real good shape right now. It's more of a day to day thing taking care of my future. I need to think about that now.

Q. What do you intend to do to have your health monitored?

A. Well, I go to a doctor, I'm through the VA because I don't have any health insurance. So, unfortunately, when I say my local doctor, they switch so much on you I don't really have one per se. I have turned it into the VA and this and that.

. . .

Q. You went over to see Dr. Schonfeld and you recall talking to him a little bit. You said you don't recall talking about your history, but you recall doing the breathing test and the examination, is that right?

A. Yes.

Q. You didn't complain to him of any shortness of breath at that time, did you, sir?

A. I did after I got through with the test.

Q. Well, that's hard work doing the test, right?

A. Yes.

Q. But the actual -- when you got there and he asked you how you're doing day to day, you weren't having any shortness of breath?

A. Can't say that. If I exercise.

Q. If you exercise a lot, sure. Now, in fact, when we talked last year you felt that your health was pretty good, right --

A. Yes, sir, it was.

Q. -- do you recall that? You've had a bit of a downturn with your diabetes?

A. Yes.

Q. After you saw Dr. Schonfeld, he did not give you, as you left that day, a report detailing his findings, did he, sir?

A. No.

Q. And he didn't mail you one either, did he?

A. No.

Q. In fact, you haven't received or seen his report until about three years later?

A. Right.

Q. You just got it recently, right?

A. Yes.

Q. Did Dr. Schonfeld send it to you?

A. I don't remember, I'm sorry.

Q. Where did you get it from, do you know?

A. No. I don't know.

. . .

Q. Now, currently you go to the VA center as a veteran for your care; is that right?

A. Yes.

Q. There is one in Mt. Vernon, as I recall, and there is a larger facility in Marion?

A, Yes.

Q. Now, as I understand your testimony, you haven't told any doctors at the VA center about what Dr. Schonfeld found, but recently you've mailed the material to them?

A. Yes.

Q. Okay. So -- and you did that when, last month?

A. I'm not sure.

Q. Was it within the last -- was it in the year 2006?

A. Yes.

Q. So you see Dr. Schonfeld in April of 2003, and the first you send this off to a doctor is 2006, true?

A. Yes.

Q. Okay. You haven't sought any medical care, psychiatric, psychological, any type of counseling for stress or anxiety, true?

A. True.

. . .

Q. You haven't asked them for any medications for anxiety, stress, that type of thing?

A. No.

Q. You're able to do the things you need to do around the house still?

A. No.

Q. You lost that ability? Is that based on the diabetes?

A. Yes.

APPENDIX F

DONALD HYATT TRIAL TESTIMONY

Q. As you sit here today, what's your understanding as to whether asbestos causes cancer?

MR. ANDREKANIC: Object to the form of the question, it's leading, it also calls for a medical conclusion.

THE COURT: Overruled. I don't think it's leading. Overruled.

THE WITNESS: Cancer.

Q. (MR. GAVIN CONTINUING) Now, how have you learned about that over the years?

A. I learned about it after I was working in the environmental department.

Q. Okay. And how does your understanding that asbestos causes cancer affect you today knowing that you've been exposed to asbestos and having been diagnosed with asbestosis?

A. Shortness of breath.

Q. I meant psychologically or emotionally.

A. Well, I'd say it's on my mind all the time, that's the reason I went to my doctor in the first place. I had pneumonia in January and I thought maybe something was coming on me then. And I went to the doctor and we got it straightened out.

Q. You said you had pneumonia in January and you said I thought something was coming on me then. What do you mean by that?

A. Well, I felt terrible and --

Q. What did you think was coming on you?

A. Anything. They talked about this asbestos and everything. I knowed I had a -- he said I had a problem, so I thought maybe I was -- a problem was coming up. I might be getting something starting up on me.

Q. Now, have you been to a psychiatrist for this issue of your fear of asbestos disease?

A. No, I haven't.

Q. Have you been to a psychologist for that reason?

A. No, sir.

Q. But you have talked to Dr. Collins?

A. I have talked to Dr. Collins.

Q. Now earlier when I asked you a question you told me you mentioned shortness of breath. Are you short of breath?

A. Yes, sir.

Q. What causes you to be short of breath or what do you link it to?

A. Well, I don't know. I was short of breath before I had my heart surgery and then I had heart surgery and I felt like a new man. And now that I feel kind of shortness of breath if I exert myself very long.

Q. Okay. Well, you've been sitting here, of course, for three years. As you sat there and listened to the evidence, were you short of breath just sitting there?

A. No.

Q. Have you used the steps here to get up to court?

A. No.

Q. If you were to climb up one flight of those steps, would --

A. I'd have to stop half way up.

Q. That makes you short of breath?

A. Yes, sir.

Q. Now, you recently were examined at the request of the railroad by a doctor in St. Louis, right?

A. Yes, sir

Q. And that doctor advised you to see your heart doctor?

A. Yes, sir.

Q. Did you do that?

A. Yes, sir, Friday after I was there.

Q. You did it as quickly as you could?

A. Yes, sir.

Q. Did that heart doctor perform a number of tests on you?

A. Yes, sir.

Q. After those tests, was your medical care changed in any way?

A. No.

Q. In other words, he didn't order further surgery or more medicine or anything like that?

A. No. He gave me a clean bill of health as far as my heart was concerned.

Q. Does your shortness of breath interfere in any of your daily activities around the home that you've talked about?

A. Yes. If I mow my yard I've got to stop and rest.

Q. What kind of mower do you use?

A. I've got a walking behind mower, weed mower. And I mow the yard with the big mower, riding mower.

Q. What size area do you walk behind a mower to mow?

A. Along the road and down along the road.

Q. How long does it take you to complete that job with rests?

A. About an hour.

Q. Do you become short of breath when you do that?

A. Yes, sir. Have to stop, shut her down for a while and rest a while.

Q. When did you have the bypass surgery?

A. 2001.

Q. 2001. All right. So when was it that you began to experience the shortness of breath that you've told these folks about?

A. About a year ago.

Q. Did you go anywhere, talk to anybody?

A. Yeah.

Q. Who did you go to?

A. Dr. Collins.

Q. I'm looking at Dr. Collins records right now.

A. Okay. Read it.

Q. In fact, it says April 7th of 2006 --

MR. GAVIN: Your Honor, you can't just read from a medical record.

THE COURT: Sustained.

Q. (MR. ANDREKANIC CONTINUING) Let me ask the question this way. In April of -- on

April 7th of 2006, did you ever tell Dr. Collins that you were short of breath and that it was a few months duration?

A. I think so.

Q. All right. So it wasn't a year ago, back in April, a month ago, you told Dr. Collins it was only for a few months; is that right?

A. Whatever it says there.

Q. And you knew that your case was already set for trial?

A. No.

Q. You didn't know your case was set for trial?

A. I don't know that it was. When did I find out?

Q. In April of 2006, a month ago, you didn't know that you were going to be in this courtroom today?

A. Yes.

Q. You told the jury that you had been going to your family doctor, Dr. Collins, rather regularly over the course of the years; is that correct?

A. Yeah.

Q. You didn't consider Dr. Schonfeld to be a treating physician, you considered Dr. Schonfeld to be this doctor who the lawyers hired as part of this screening; is that right?

A. Probably so.

Q. Probably or yes?

A. Yes

APPENDIX G

FEAR OF CANCER INSTRUCTION

If you decide for the plaintiff, Delbert Copple, on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate him for any of the following elements of damages proved by the evidence to have resulted, in whole or in part, from the negligence of the defendant, taking into consideration the nature, extent and duration of the injury:

The disability experienced and reasonably certain to be experienced in the future.

The pain and suffering experienced and reasonably certain to be experienced in the future as a result of the injuries.

The genuine and serious fear of cancer experienced and reasonably certain to be experienced in the future.

The present cash value of the reasonable expenses of medical care, treatment and services reasonably certain to be received in the future.

Whether any of these elements of damages has been proved by the evidence is for you to determine.

Plaintiff Copple's Instruction No.31B

I.P.I Nos. 30.01, .04, 04.01, 04.02, 05, and .06 (2006).

APPENDIX H

DEFENDANT'S PROPOSED FEAR OF CANCER INSTRUCTIONS DENIED BY TRIAL COURT

DEFENDANT'S PROPOSED INSTRUCTION NO. 4

In order to recover for fear of cancer, a plaintiff must demonstrate that his fear is genuine and serious.

This means fear that significantly and detrimentally affects the ability to carry on every day life and work.

DEFENDANT'S PROPOSED INSTRUCTION
NO. 5A

In order to recover for fear of cancer, a plaintiff must prove that it is more probably true than not true that his fear is genuine and serious.

Ayers v. Norfolk & Western Railway
538 U.S. 135 (2003)

APPENDIX I

VERDICT FORMS

VERDICT FORM A

We, the jury, find for Delbert Copple and against Illinois Central Railroad Company.

We assess the damages in the sum of $ 220,000.00 , itemized as follows:

The disability experienced and reasonably certain to be experienced in the future $ 75,000.00 ;

The pain and suffering experienced and reasonably certain to be experienced in the future as a result of the injuries $ 15,000.00 ;

The genuine and serious fear of cancer experienced and reasonably certain to be experienced in the future $ 30,000.00 ; and

The present cash value of the reasonable expenses of medical care, treatment and services reasonably certain to be received in the future $ 100,000.00 .

TOTALS $ 220,000.00

Foreperson

/s/ _____	/s/ _____
/s/ _____	/s/ _____
/s/ _____	/s/ _____
/s/ _____	/s/ _____
/s/ _____	/s/ _____
/s/ _____	/s/ _____

[Filed, Clerk of the Circuit Court, June 01, 2006
Ronda Yates, Marion County, Salem Illinois]

VERDICT FORM D

We, the jury, find for Carl Heinrichsmeyer against Illinois Central Railroad Company.

We assess the damages in the sum of $ 167,000.00 , itemized as follows:

The disability experienced and reasonably certain to be experienced in the future $ 75,000.00 ;

The pain and suffering experienced and reasonably certain to be experienced in the future as a result of the injuries $ 15,000.00 ;

The genuine and serious fear of cancer experienced and reasonably certain to be experienced in the future $ 30,000.00 ; and

The present cash value of the reasonable expenses of medical care, treatment and services reasonably certain to be received in the future $ 47,000.00 .

TOTALS $ 167,000.00

Foreperson

/s/	/s/
/s/	/s/
/s/	/s/
/s/	/s/
/s/	/s/
/s/	/s/

[Filed, Clerk of the Circuit Court, June 01, 2006
Ronda Yates, Marion County, Salem Illinois]

VERDICT FORM F

We, the jury, find for Donald Hyatt against Illinois Central Railroad Company.

We assess the damages in the sum of $ 220,000.00 , itemized as follows:

The disability experienced and reasonably certain to be experienced in the future $ 75,000.00 ;

The pain and suffering experienced and reasonably certain to be experienced in the future as a result of the injuries $ 15,000.00 ;

The genuine and serious fear of cancer experienced and reasonably certain to be experienced in the future $ 30,000.00 ; and

The present cash value of the reasonable expenses of medical care, treatment and services reasonably certain to be received in the future $ 100,000.00 .

TOTALS $ 220,000.00

Foreperson

/s/	/s/
/s/	/s/
/s/	/s/
/s/	/s/
/s/	/s/
/s/	/s/

[Filed, Clerk of the Circuit Court, June 01, 2006
Ronda Yates, Marion County, Salem Illinois]

APPENDIX J

FIRST TRIAL GROUP

JOSEPH DENK TRIAL TESTIMONY

Q. I mean, you had to make a real effort?

A. Yes, sir.

Q. Do you remember Dr. Schonfeld?

A. Yes, sir.

Q. Did he tell you in 2002 that you had asbestosis?

A. Yes, sir.

Q. Did he tell you anything about asbestos and your risk of cancer?

A. That was my first indication of the asbestos being as effective as it is.

Q. As being a cancer causing?

A. Yes.

Q. Now Joe, you mention your wife passed away about a year ago?

A. Yes, sir.

Q. What did she die from, Joe?

MR. KURZ: Objection, relevance, Your Honor.

THE COURT: I'm going to allow it over objection. I think I know where this is going.

THE WITNESS: She had a battle with cancer seven years. She had a radical mastectomy and five years later she had pancreas cancer.

Q. (MR. GAVIN CONTINUING) She had pancreatic cancer, right?

A. Yes.

Q. Now, of course, you were with your wife while she was ill, right?

A. Yes.

Q. And did you see how her cancer, both cancers, affected her?

MR. KURZ: Same objection. May I show a continuing objection?

THE COURT: Yes, you can show a continuing objection.

THE WITNESS: We were married 64 years so I was constantly with her. Even at a deposition and everything else. The gentleman said they would halt the deposition and let me go home because my wife was on her death bed at that time. But we continued the deposition. For all concerns we did that.

Q. (MR. GAVIN CONTINUING) I'm going to say this bluntly to you, Joe. Did you see how your wife suffered with her cancer?

A. Yes.

Q. Now Joe, after you saw how your wife suffered with her cancer, how do you feel about getting cancer from asbestos exposure?

A. Well, it's not a very good feeling to have something that affects yourself. After -- like I say, 64 years together, no matter what it is you're one person and whatever affects one affects the other.

APPENDIX K

DANIEL HOGAN TRIAL TESTIMONY

A. And the first thing this doctor did was make me have a physical. And with the physical I had a chest x-ray and he seen a spot on my lung that he didn't like. He sent me to a lung specialist. The lung specialist gave me a CAT scan, a lung scan and he spotted what he thought was a tumor on the back of my right upper lobe of my right lung. And when they tell you that, you don't think, well, could be nothing. But the surgeons I knew from where I worked, I took the pictures to them, friends of mine, wanted to know what they thought, second opinion. And all of them said get it taken out right away, whenever you can. Now, this was in December of 1999 and I seen a surgeon right away and he set it up. They operated on me January 7th, 2000.

Q. And did you find out that this spot was cancer?

A. It was a tumor. The doctor looked at -- well, they opened me up from my neck down to my hip and when he seen the tumor he thought it was too bad to just take the tumor out, so they took the upper lobe of my right lung out, the whole lobe. That's 20 percent of your lung.

Q. How did you feel when you found out it was diagnosed as cancer?

A. Oh, God, scares the heck out of you. Lung cancer anyway, any kind of cancer scares you. I had a family member die of cancer so I know what it was like.

Q. Now, Dan, how long were you in the hospital?

A. I'm going to say three or four weeks.

Q. That long in the hospitals?

A. Right.

Q. How did you feel after the surgery?

A. Oh, God, you hurt. You were hurting after the surgery then you can't breathe. I had oxygen on me most of the time. And you are worried about it because you don't know if it's malignant or isn't malignant. And he said the lymph nodes around the upper lobe of my right lung didn't look that bad so he didn't take them out. And when they had the tumor tested, it was a malignant tumor.

Q. It was?

A. It was.

Q. Okay. Now --

A. So that scares you too.

Q. And were you frightened about the process?

A. You're right. You got to be frightened about that, any kind of cancer.

Q. Okay. Now we're in about January, February 2000, right?

A. Right.

. . .

A. He didn't get into that. He just said it could have been. The tumor could have been caused by asbestos.

Q. Well, how have you done since 2003 in the sense of how you feel? I mean, how do you feel?

A. I feel all right. But you still got to think about you had the cancer, you know. Like I said, I had a relative die from cancer and, you know, you don't

know if it's going to come back or not. So you always worry about it.

Q. So are you concerned today about whether you are going to get lung cancer?

A. Oh, sure, sure, you are.

Q. And how does that affect you, Dan?

A. Well, you hope that it didn't mastisize and get to other parts of your body. Because down the line I had a PSA test and my PSA was elevated. So Dr. Chandon, my family doctor, sent me to a urologist. The urologist took some tests on me and said I had a -- I had to go in for radiation treatment, I had an elevated PSA.

Q. Let me interrupt, okay, because we have to follow some rules here. So you went and found out you had an abnormal PSA test?

A. Right.

Q. And this is a prostate thing, right?

A. Right.

Q. Knowing you had had lung cancer, what did that make you think?

A. Well, you never know if the lung cancer caused the prostate cancer. You don't know.

MR. PETERS: Your Honor, can we approach?

THE COURT: Yes.

(Whereupon a side bar commenced.)

THE COURT: For the record, we're at a side bar outside the hearing of the jury.

MR. PETERS: Your Honor, I was barred by a pretrial motion from getting into any other condition this individual had that didn't relate to his symptoms. He had prostate cancer, that's unrelated. There is no testimony that's connected to his

exposure. He also has skin cancer as a problem that he's being treated with now. His prostate cancer was in 2001. The question was after 2000. Now we have got this out there, this prostate thing, where this guy's afraid after he got his cancer -- because he got prostate cancer he should be more afraid from getting more cancer. I was barred from getting into it. I don't know if this witness wasn't counseled or didn't follow what Mr. Gavin told him, but he should not have even mentioned this. I move for a mistrial and have the testimony be stricken in a lesser alternative.

. . .

THE COURT: The attorneys have agreed that the prostate cancer in itself has nothing to do whatsoever with this case, it is unrelated to any lung cancer. And the attorneys have agreed that it is unrelated to any of the issues in this case. So you should in no way consider that prostate cancer is a result of anything having to do with this lawsuit. And you should not consider that in any way in your deliberations. You may proceed.

Q. (MR. GAVIN CONTINUING) Dan, just a couple more points. Do you experience today shortness of breath?

A. I always have, yes, I do.

Q. Are there certain things that cause you to be short of breath more than others?

A. Well, the further you walk the more shortness of breath you'll have.

Q. And then finally, Dan, for your medical treatment, for your lung cancer, did you get medical bills from doctors and hospitals and things? Did you get the bills? Were there medical bills?

A. There were.

MR. GAVIN: Okay. Thank you, Your Honor, that's all I have.

THE COURT: Mr. Peters, you may proceed.

CROSS EXAMINATION

QUESTIONS BY MR. PETERS:

Q. Mr. Hogan, good afternoon.

A. Good afternoon.

Q. We talked a little bit about your lung cancer and some of the concerns you have with that lung cancer; is that correct?

A. Pardon me?

Q. You've talked a little bit about the fact that --

A. Yes, sir, I did.

Q. Has anybody taken the time to tell you that for all practical purposes you are cured?

A. No.

Q. Did Dr. Schonfeld tell you that?

A. No.

Q. Did any of your treating doctors tell you that?

A. No.

Q. Is that something you'd like to know if it's true?

A. Sure.

Q. Okay. What would that do to your fear if you found out that you were essentially cured?

A. Well, I don't know if they ever know that.

Q. If a doctor told you that, would that make you feel better?

A. It makes you feel better, but --

Q. Now, you were talking a little bit about your work. Well, actually quite a bit about it. There weren't diesel engines operating every day in the shops, correct?

A. No.

APPENDIX L

FIRST TRIAL GROUP VERDICT FORMS

VERDICT FORM B

[Received, Clerk Appellate Court, 5th District Mt. Vernon, IL, Jan. 24, 2007]

[Filed, Jan. 24, 2007, Louis E. Costa, Clerk, Appellate Court, 5th District]

We, the jury, find for Daniel Hogan and against Illinois Central Railroad Company and further find the following:

First: Without taking into consideration the question of reduction of damages due to the negligence of Daniel Hogan we find that the total amount of damages suffered by Daniel Hogan as a result, in whole or in part, of the occurrences in question is $ 310,000 , itemized as follows:

The disfigurement resulting from the injury $ 0 ;

Loss of a normal life experienced and reasonably certain to be experienced in the future $ 50,000 ;

The pain and suffering experienced and reasonably certain to be experienced in the future as a result of the injuries $ 200,000 ;

The fear of cancer experienced and reasonably certain to be experienced in the future $ 0 ; and

The reasonable expense of necessary medical care, treatment, and services received $ 60,000 .

TOTAL $ 310,000 .

Second: we find that the percentage of such negligence attributable to Daniel Hogan is 65 percent (%).

Third: After reducing the total damages sustained by Daniel Hogan by the percentage of negligence attributable to Daniel Hogan we assess Daniel Hogan's recoverable damages in the sum of $ 108,500 .

[Filed, Clerk of the Circuit Court, March 30, 2006
Ronda Yates, Marion County, Salem Illinois]

VERDICT FORM B

Daniel Hogan

Foreperson

/s/ _____	/s/ _____
/s/ _____	/s/ _____
/s/ _____	/s/ _____
/s/ _____	/s/ _____
/s/ _____	/s/ _____
/s/ _____	/s/ _____

VERDICT FORM D

We, the jury, find for Joseph Denk and against Illinois Central Railroad Company.

We assess the damages in the sum of $ 150,000, itemized as follows:

Loss of a normal life experienced and reasonably certain to be experienced in the future $ 50,000;

The pain and suffering experienced and reasonably certain to be experienced in the future as a result of the injuries $ 100,000; and

The fear of cancer experienced and reasonably certain to be experienced in the future $ 0.

TOTAL $ 150,000.

Foreperson

/s/ _____	/s/ _____
/s/ _____	/s/ _____
/s/ _____	/s/ _____
/s/ _____	/s/ _____
/s/ _____	/s/ _____
/s/ _____	/s/ _____

[Filed, Clerk of the Circuit Court, March 30, 2006
Ronda Yates, Marion County, Salem Illinois]

APPENDIX M

THURSTON HENSLEY v. CSX TRANSPORTATION, INC.

No. E2007-00323-COA-R3-CV

COURT OF APPEALS OF TENNESSEE, AT KNOXVILLE

2008 WL 683755

February 6, 2008, Session, at the University of Tennessee College of Law

March 14, 2008, Filed

OPINION BY: CHARLES D. SUSANO, JR.

OPINION

Thurston Hensley ("Employee") sued CSX Transportation, Inc. ("Railroad") pursuant to the Federal Employees Liability Act ("FELA"), *45 U.S.C. §§ 51-60 (2008)*, alleging that he contracted toxic encephalopathy and asbestosis in the course and scope of his employment as an electrician with Railroad. The case was tried to a jury, which found in favor of Employee and awarded him $ 5,000,000 in compensatory damages. Railroad appeals, alleging that the trial court erred in the following ways: by directing a verdict against it on the Railroad's

statute of limitations defense; by charging the jury with divergent standards of negligence and causation with regard to Railroad's negligence and Employee's negligence; by giving the jury a verdict form that, according to Railroad, predetermined the issue of whether Employee actually had the diseases he claims; by failing to instruct the jury that a plaintiff's fear of cancer must be "genuine and serious"; by failing to declare, as a matter of law, that Employee's evidence did not satisfy that standard; and by failing to declare a mistrial because of Employee's closing argument, which Railroad claims was inflammatory. We reject all of Railroad's arguments. Accordingly, we affirm.

OPINION

I.

Only a very brief outline of the facts is needed here; additional details will be discussed as appropriate in our analyses of the issues raised by Railroad. Employee began working as an electrician for Railroad in 1971. His work exposed him to asbestos and to a cleaning agent called Dowclene. These exposures form the basis of Employee's lawsuit against Railroad. Employee claims [*3] that repeated, long-term, high-dose exposure to these substances caused him to contract asbestosis, a lung disease, and toxic encephalopathy, a brain disease. Employee presented evidence that Railroad was aware for years of the dangers posed by asbestos and Dowclene, but that it still exposed him to them, failed to educate him about the risks and failed to provide adequate safeguards to ensure that his working conditions were safe. Railroad denies all of

the operative allegations of the complaint. Specifically, it contends that Employee does not have either asbestosis or encephalopathy; that his exposure to asbestos and Dowclene was minimal and non-damaging; that whatever physical ailments he has were not caused by such exposure; and that Employee *was* educated about the risks and that proper safety procedures *were* followed. The jury sided with Employee. Railroad appeals.

State and federal courts have concurrent jurisdiction over FELA claims. *See 45 U.S.C. § 56.* "In FELA cases tried in state courts, the applicable state rules generally govern procedural matters, while federal law controls as to all matters of substantive law." *Jennings v. Illinois Cent. R.R. Co., 993 S.W.2d 66, 70 (Tenn. Ct. App. 1998).* State procedural rules give way to federal law if "application of [state] rules would interfere with a party's substantive federal rights or defenses." *Pomeroy v. Illinois Cent. R.R. Co., No. W2004-01238-COA-R3-CV, 2005 Tenn. App. LEXIS 294, 2005-WL 1217590, at *12 (Tenn. Ct. App. W.S., filed May 19, 2005)* (citing *Brown v. W. Ry. of Ala., 338 U.S. 294, 296, 70 S. Ct. 105, 94 L. Ed. 100 (1949)*).

The United States Supreme Court has held that a jury verdict in a FELA case is entitled to great weight on appeal. *See Biddle v. Norfolk S. Ry. Co., No. E1999-025840-COA-R3-CV, 2000 Tenn. App. LEXIS 560, 2000 WL 1185575, at *6 (Tenn. Ct. App. E.S., filed August 22, 2000); Gentry v. Norfolk S. Ry. Co., No. 03A01-9610-CV-00341, 1997 Tenn. App. LEXIS 505, 1997 WL 406377, at *3 (Tenn. Ct. App. E.S, filed July 22, 1997).* "Only when there is a complete absence of probative facts to support the conclusion reached (by the jury) does a reversible

error appear." *Dennis v. Denver & Rio Grande W. R.R. Co., 375 U.S. 208, 210, 84 S. Ct. 291, 11 L. Ed. 2d 256 (1963)* (*quoting Lavender v. Kurn, 327 U.S. 645, 653, 66 S. Ct. 740, 90 L. Ed. 916 (1946)*). Thus, where Railroad challenges the sufficiency of the evidence to support an aspect of the jury's verdict, we may not re-weigh the evidence or assess the credibility of witnesses in reaching a conclusion contrary to the verdict. *Lavender, 327 U.S. at 652-53.* Our "function is exhausted when [the verdict's] evidentiary basis becomes apparent, it being immaterial that the [reviewing] court might draw a contrary inference or feel that another conclusion is more reasonable." *Id. at 653.* This is essentially the standard of review for jury cases under Tennessee law, pursuant to which we are "required to take the strongest legitimate view of all the evidence in favor of the verdict, to assume the truth of all [evidence] that tends to support [the verdict], allowing all reasonable inferences to sustain the verdict, and to discard all [evidence] to the contrary." *Forrester v. Stockstill, 869 S.W.2d 328, 329 (Tenn. 1994)* (citation omitted). In short, we must affirm the jury's verdict if there is any material evidence to support it. *Id.*

In addition to sufficiency questions, Railroad challenges the propriety of some of the jury instructions. Because the substantive law of FELA cases is federal, jury instructions must correctly reflect the controlling federal common law. *Palmer v. Norfolk-Southern Ry. Co., No. 03A01-9309-CV-00313, 1994 Tenn. App. LEXIS 162, 1994 WL 111037, at *2 (Tenn. Ct. App. E.S., filed March 30, 1994).* The determination of whether jury instructions are proper is a question of law to be reviewed by us *de novo* with no presumption of correctness. *See*

Solomon v. First Am. Nat'l Bank, 774 S.W.2d 935, 940 (Tenn. Ct. App. 1989). "Since the instructions are the sole source of the legal principles needed to guide the jury's deliberations, trial courts must give substantially accurate instructions concerning the law applicable to the matters at issue." *Ladd v. Honda Motor Co., 939 S.W.2d 83, 94 (Tenn. Ct. App. 1996)* (citations omitted). However, "[j]ury instructions need not be perfect in every detail." *Id.* We must consider the jury charge as a whole, and we will not invalidate it if it fairly defines the legal issues in the case and does not mislead the jury. *See Hunter v. Burke, 958 S.W.2d 751, 756 (Tenn. Ct. App. 1997).* The federal courts take a similar approach:

> We review jury instructions as a whole to determine whether they adequately inform the jury of the relevant considerations and provide a basis in law for aiding the jury in reaching its decision. A judgment on a jury verdict may be vacated when the instructions, viewed as a whole, were confusing, misleading, and prejudicial. It is not error to refuse to give a requested instruction that correctly states the law, as long as the instructions actually given fairly and adequately cover the material issues.

Jones v. Consolidated Rail Corp., 800 F.2d 590, 592 (6th Cir. 1986) (citations omitted).

Standards of review for the additional issues raised by Railroad will be discussed as those issues are reached by us. We address each of Railroad's five issues in turn.

II.

Railroad first argues that the trial court erred when it directed a verdict for the Employee with respect to Railroad's claim that Employee's suit was filed outside the FELA's three-year statute of limitations. A directed verdict "is appropriate only when the evidence is susceptible to but one conclusion." *Alexander v. Armentrout, 24 S.W.3d 267, 271 (Tenn. 2000)*. In reviewing whether a trial court acted properly in directing a verdict, we must "take the strongest legitimate view of the evidence favoring" the party against whom the verdict was granted. *Id.* (*quoting Long v. Mattingly, 797 S.W.2d 889, 892 (Tenn. Ct. App. 1990)*). If reasonable minds could differ as to the conclusions to be drawn from the evidence presented, a directed verdict is not appropriate.

Employee was diagnosed with toxic encephalopathy and asbestosis on May 24, 2000; he filed suit on January 10, 2002, less than two years later and well within the three-year statute of limitations. However, as Railroad rightly points out, the test for statute of limitations purposes is not necessarily whether a formal diagnosis has occurred. The statute begins to run as soon as the injured party is "in possession of the critical facts" necessary to discover that a potential cause of action exists - namely, "that he has been hurt and who has inflicted the injury." *United States v. Kubrick, 444 U.S. 111, 122, 100 S. Ct. 352, 62 L. Ed. 2d 259 (1979)*. Railroad also correctly notes that an affirmative duty to investigate one's symptoms and their causes arises when a claimant "should have known" that such an investigation was needed; in these cases, the statute of limitations will "start[] to run when a reasonable

person would know enough to prompt a deeper inquiry[.]" *Nemmers v. United States, 795 F.2d 628, 631 (7th Cir. 1986).* The question that must be answered, therefore, is not simply when Employee was first diagnosed with the subject illnesses, but when he first knew - or should have known - of the critical facts: (1) that he had these illnesses, and (2) that they were caused by Railroad. If he knew or should have known the critical facts prior to January 10, 1999, then his action is time-barred.

Railroad contends that the trial court sidestepped this critical timing issue by ruling that the statute of limitations was equitably tolled because of brain damage to Employee - allegedly a symptom of his solvent exposure - during the period when the statute might otherwise have run. Although it is unclear to us whether the trial court was invoking "equitable tolling" or was simply applying the reasonable-person standard to Employee's circumstances, it is true that Employee's alleged brain damage was initially the court's sole stated rationale for ruling as it did on this point:

> [R]egardless of the cause of this man's condition[,] in terms of his memory, brain functioning, whatever you want to call his deficit, I think that precludes the statute of limitations issue that he knew or should have known of what he complains of in this lawsuit.

However, the court later cited an additional rationale for its conclusion that the statute of limitations had not run on Employee's claim: namely, that the quantum of Employee's pre-1999 knowledge was insufficient to support a finding that he knew or

should have known the critical facts, regardless of whether he was suffering brain damage during the period in question. The court stated:

> I have really already ruled that I don't believe, given the factual scenario of this case if nothing else, that somebody with brain damage could have known or should have known.
>
> * * *
>
> I remember also that besides my feeling about it as known or should have known, that his first symptoms, if I'm not mistaken, were headache and bloating. Certainly as I remember the proof, that was not classic symptoms of [toxic encephalopathy]. I don't know that with this big of a disputed and complicated diagnosis that any of us would have known that bloating and headaches could be a problem. If my recollection of the proof is correct, [and] I stand to be corrected, that's what I'm going to rule on that.

Railroad's attorney did not take up the trial judge's offer to "correct[]" her "recollection of the proof" - probably because the court's recollection was accurate, as will be seen.

We believe this second rationale for the trial court's conclusion on the statute of limitations issue is more convincing than the "brain damage" rationale. Accordingly, we decline to address Railroad's arguments with respect to the trial court's "brain damage" theory, since the lower court's ruling

will stand so long as the second theory is adequately supported. We "will affirm a decree correct in result, but rendered upon different, incomplete, or erroneous grounds." *Continental Cas. Co. v. Smith, 720 S.W.2d 48, 50 (Tenn. 1986). See also Shutt v. Blount, 194 Tenn. 1, 249 S.W.2d 904, 907 (Tenn. 1952)* ("if the Trial Judge reached the right result for the wrong reason, there is no reversible error").

As the trial court noted, the only evidence presented by Railroad that might be seen as tending to establish *both* "critical facts" - Employee's claimed illnesses and their purportedly work-related cause - relates to two particular symptoms: headaches and bloating. Yet although there was evidence that Employee had these symptoms prior to 1999 and suspected that they might be work-related, no evidence was presented that they *were* work-related, *i.e.*, that they actually resulted from Employee's exposure to solvents or asbestos, or that they are in fact symptoms of Employee's encephalopathy or asbestosis. Indeed, Employee's doctor, Michael Kelly, while under cross examination by Railroad's counsel, conceded that the headaches were *not* a symptom of solvent exposure:

> Q: Mr. Hensley told you he has constant headaches.
>
> A: He does have headaches.
>
> Q: And I think you'll agree with me that headaches are not a symptom of - a chronic symptom of exposure to solvents.
>
> A: You wouldn't expect them to be, correct.

Further, as Employee notes in his brief, "No witness testified that the bloating was the result of chemicals at all." In its reply brief, Railroad does not contest this point, and appears to concede the "headaches" issue, describing Employee's "belief of a link" between headaches and solvent exposure as "incorrect." This is crucial, because Railroad's argument relies heavily upon testimony that Employee was urged by fellow employees and by his wife to see a "poison doctor" *for his headaches and bloating*. There is no evidence that anyone urged Employee to see a "poison doctor" about his other, ultimately more relevant symptoms (*e.g.*, dizzy spells, cognitive problems, shortness of breath), nor is there any other evidence to suggest that Employee knew or should have known that *those* symptoms were work-related. Railroad's argument fundamentally rests upon the notion that Employee knew or should have known that his headaches and bloating were work-related - even though, according to this record, they were not.

Railroad says this is immaterial. "It matters not whether Plaintiff was correct in his belief that the headaches were caused by solvents," Railroad argues in its brief. "The legal issue is whether his belief raised a duty to investigate, thus triggering the running of the statute of limitations." We disagree with this logic insofar as it appears to suggest that knowledge of *any* purportedly work-related symptom - even if ultimately proven non-work-related and, in any event, irrelevant to the claims at issue - gives rise to a general duty to investigate one's physical condition, which in turn causes the statute of limitations to run with regard to any and all unknown work-related injuries that may happen to

exist contemporaneously with the known, non work-related injury. This seems to us the necessary implication of Railroad's argument, and we cannot accept it. Contrary to Railroad's contention, we hold that it *does* matter whether the condition that a plaintiff is under a duty to investigate is the same condition that he is seeking damages for. The duty to investigate is, at least broadly speaking, condition-specific. A defendant cannot rely on a plaintiff's prior erroneous belief that a different, unrelated condition was work-related in order to retroactively trigger the statute of limitations on the far more serious condition that the plaintiff ultimately discovers and for which he sues.

If Employee were suing for damages caused by his headaches and bloating, his action might well be time-barred; certainly under that scenario a fact issue for the jury would have been created. However, he is not suing for "headaches and bloating," but rather for damages caused by toxic encephalopathy and asbestosis. There is absolutely no evidence linking his headaches or bloating to these conditions, nor any evidence suggesting that his pre-1999 knowledge of *actual* encephalopathy and asbestosis symptoms - such as cognitive problems and shortness of breath - was coupled with knowledge sufficient to put him on notice of a connection between *those* symptoms and his work for Railroad. Nor do we believe that the evidence presented regarding Employee's encephalopathy and asbestosis symptoms could have given rise to a reasonable inference that such constructive notice existed. Perhaps a jury could conclude that Employee had a vague suspicion of his injuries and their causes, but we agree with the Supreme Court of Virginia that "[a]n employee's

mere suspicion of an injury or its probable cause, standing alone, is not the operative standard for determining when a cause of action accrues under FELA." Gay v. Norfolk & W. Ry. Co., *253 Va. 212, 483 S.E.2d 216, 217 (Va. 1997)* (emphasis added). For all of these reasons, we conclude that a directed verdict in Employee's favor on this issue was proper. Simply stated, Railroad did not present the evidence needed to establish a statute of limitations defense, and thus there was no factual dispute to be resolved by a jury.

III.

A.

Railroad's second argument is that the judgment must be reversed because the jury instructions and verdict form created a "double standard" between, on the one hand, the levels of negligence and causation that Employee was required to prove, and, on the other hand, the levels of *comparative* negligence and causation that Railroad was required to prove. Railroad asserts that such inconsistency was declared improper by the United States Supreme Court in *Norfolk S. Ry. Co. v. Sorrell, 549 U.S. 158, 127 S. Ct. 799, 166 L. Ed. 2d 638 (2007)*, a case that was decided after the judgment below but before this appeal.

The judge instructed the jury, in pertinent part, as follows:

> In this action Mr. Hensley has the burden of establishing by a preponderance of the evidence all the facts necessary to prove the following issues: *Was CSX negligent, even in the*

slightest; and did that negligence cause injury to Mr. Hensley; and what damages, if any, is he entitled to.

The defendant, CSX has the burden of establishing by a preponderance of the evidence all of the facts necessary to prove the following issues: *was Mr. Hensley negligent*, and did that negligence contribute to his injuries.

* * *

If a carrier such as CSX Transportation was negligent and its negligence was a cause *in whole or in part* of Mr. Hensley's injuries, CSX Transportation is liable in damages, although CSX Transportation's negligence was not the sole cause of the injuries and although the negligence of a third person may have contributed in equal, greater, or lesser degree in causing injury.

In deciding this case you must determine the fault, if any, of each of the parties. If you find more than one of the parties at fault, you will then compare the fault of the parties. To do this you will need to know the definition of fault. CSX is at fault if you find that CSX *was negligent, even in the slightest*, and that the negligence was a legal cause of injury to Mr. Hensley. The plaintiff, Mr. Hensley, is a[t] fault if you find that *he was negligent* and that

negligence was a legal cause of his injury.

* * *

If you find that CSX *was negligent, even in the slightest, and/or Mr[.] Hensley was negligent* and that this negligence was a legal cause of the injury or damages for which a claim is made, you have found that party to be at fault.

(Emphasis added.) In addition, the verdict form stated as follows:

1. Do you believe from the evidence that CSX was *negligent, even the slightest,* and such negligence was a *cause, in whole or in part,* of the asbestosis the Plaintiff claims?

YES NO

2. Do you believe from the evidence that CSX was *negligent, even the slightest,* and such negligence was a *cause, in whole or in part,* of the toxic encephalopathy the Plaintiff claims?

YES NO

If you check "NO" to both numbers 1 & 2, please return to the courtroom.

3. Do you believe from the evidence that Mr. Hensley was *negligent* and such negligence was a *cause* of his claimed [injuries?]

(Emphasis in paragraphs 1, 2, and 3 added; other emphasis in original).

Railroad argues that these instructions and the jury verdict form are improper under *Sorrell*, a case that arose out of Missouri litigation under FELA in which the instructions stated that the employee is contributorily negligent if his negligence "directly contributed to cause" the injury, *Sorrell, 127 S. Ct. at 803*, while the railroad is judged by whether its negligence "contributed in whole or in part" to the injury. *Id. at 814*. The Supreme Court invalidated that instruction, saying it was based on an incorrect reading of FELA, and declared that "the same standard of causation applies to railroad negligence under *Section 1 [of FELA]* as to plaintiff contributory negligence under *Section 3*." *Id. at 808*.

The parties take contrary positions with respect to *Sorrell*'s applicability to various aspects of this case, including whether the standards of not just causation, but also negligence (*i.e.*, breach), must be equal. For the sake of argument only, we will assume that Railroad is correct and that the instructions and verdict form in the instant case are improper under *Sorrell*. Railroad still loses this issue because it explicitly conceded the correctness of the trial court's jury instruction on the issue at hand, thereby inviting any error that the trial court may have committed.

B.

"*Tenn. R. Civ. P. 51.02* provides that a party may seek a new trial because of an inaccurate instruction, even if it did not object to the instruction at trial." *Grandstaff v. Hawks, 36 S.W.3d 482, 489 (Tenn. Ct. App. 2000)*. In the instant case, Railroad cited both

the jury instructions and the verdict form[1] in its motion for a new trial.[2] However, Railroad cannot claim the protection of *Rule 51.02*, because Railroad did not merely fail to object at trial to the instructions and form; *it affirmatively acquiesced in them, explicitly asserting that they were legally correct*. The transcript clearly demonstrates this fact:

> [EMPLOYEE'S COUNSEL]: I handed you what really is the verdict - one of the proposed verdict forms, and my point was that the - as to causation, I looked at our causation instructions and the causation instruction I think just

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[1] We note that, although a party's failure to object is nonfatal with regard to erroneous instructions, *omissions* from jury instructions must be objected to, or the issue is waived. *Rule v. Empire Gas Corp., 563 S.W.2d 551, 553 (Tenn. 1978)*. In addition, errors or omissions in a *verdict form* are waived unless objected to at trial. *Keith v. Murfreesboro Livestock Market, Inc., 780 S.W.2d 751, 759 (Tenn. Ct. App. 1989)*. However, as will be seen, we hold that Railroad invited error with regard to all of the disputed instructions *and* the verdict form. Thus, we need not decide whether the purported problems with the instructions are properly characterized as errors or as omissions, nor whether Railroad's objection to other aspects of the verdict form, coupled with its offer of an alternative verdict form that did not contain the language disputed here, is sufficient to establish that Railroad raised the verdict-form issue.

[2] Railroad's motion objects specifically to the inconsistent *negligence* standards. The motion makes no specific comment on the inconsistent causation standards. Employee contends that the motion raises only the negligence issue, not the causation issue. As will be seen, we need not decide this question, as we find that both issues were conceded notwithstanding the motion for a new trial.

needs to be added in whole or in part under - under the claim of negligence, whenever there's a reference to cause, it just should be comma, in whole in or part. Because under FELA law, unlike regular negligence actions, the law is in whole or in part.

[RAILROAD'S COUNSEL:] *I agree with that, Your Honor.*

* * *

[EMPLOYEE'S COUNSEL:] And its negligence was a cause, in whole or in part. And, really, the theme throughout all the instructions, whenever the question is about cause or causation, should just be that same entry throughout that and that would satisfy the causation aspect of the case.

THE COURT: Okay.

[EMPLOYEE'S COUNSEL:] The other issue that I think we raised yesterday, Your Honor, I think we're [*i.e.*, Employee and Railroad] probably in agreement on this as well. It relates to the negligence standard.

THE COURT: Okay.

[EMPLOYEE'S COUNSEL:] It's the same type of situation under FELA. It's negligence, comma, even the slightest,

comma. Because under the FELA law the burden or the standard is much less than the regular negligence, so whenever Your Honor gives instructions on negligence, it's even the slightest negligence.

THE COURT: Okay.

[EMPLOYEE'S COUNSEL:] I think we're in agreement on that, aren't we, Randy [Railroad's counsel]?

[RAILROAD'S COUNSEL:] Yeah, *I'm fine with that, Your Honor. I don't like it, but it's the law.*

[EMPLOYEE'S COUNSEL:] It's amazing. I like it when lawyers know the law. And Randy, obviously, has handled enough of these railroad cases that [he knows] that's the law and we're stuck with it.

* * *

[EMPLOYEE'S COUNSEL:] [I]f Your Honor does decide to give the comparative negligence [instruction] . . . the "in whole or in part" part for the railroad doesn't apply to Mr. Hensley.

THE COURT: Correct.

[EMPLOYEE'S COUNSEL:] That's only for the railroad.

THE COURT: That's why I just added on on the top one, the Plaintiff, was CSX negligent in whole or in part and did that negligence cause injury.

[EMPLOYEE'S COUNSEL:] Actually, the negligence is even in the slightest, the causation is in whole or in part.

THE COURT: I'm sorry. All right.

[EMPLOYEE'S COUNSEL:] It's complicated. It took me several years to figure this thing out.

THE COURT: Even in the slightest?

[EMPLOYEE'S COUNSEL] Even in the slightest.

THE COURT [addressing Railroad's counsel]: Is that - I understand you don't like it, but is that all right with you?

[RAILROAD'S COUNSEL:] *It makes me a little ill every time I hear it, but that's where we are, Judge.*

THE COURT: Okay.

(Emphasis added.)

Although Railroad could have overcome a mere failure to object to purportedly erroneous instructions by taking issue with them in its motion for a new trial, its concessions at trial constitute "invited error," which is not so easy to overcome. As

this court noted in *Knoxville Cmty. Dev. Corp. v. Bailey, No. E2004-01659-COA-R3-CV, 2005 Tenn. App. LEXIS 359, 2005 WL 1457750, at *5 (Tenn. Ct. App. E.S., filed June 21, 2005)*, invited error is separate and distinct from mere failure to object under *Rule 51.02*. We pointed out in *Bailey* that the Tennessee Supreme Court held in a 1937 case - admittedly before the adoption of *Rule 51.02* - that the rule of invited error applies to jury instructions. *Gentry v. Betty Lou Bakeries, 171 Tenn. 20, 100 S.W.2d 230, 231 (Tenn. 1937)*. That statement of law was reiterated in a post-*Rule 51.02* case, *Roseberry v. Lippner, 574 S.W.2d 726, 729 (Tenn. 1978)*, in which the Supreme Court held that an erroneous jury instruction "was invited error, and plaintiff will not be heard to complain on appeal of error which she induced the Court to commit." But the clearest and most directly applicable analysis of the interplay between invited error and *Rule 51.02* comes from *Haddock v. Lummus Cotton Gin Co., 552 S.W.2d 390, 391 (Tenn. Ct. App. 1976)*, in which this court refused to consider a plaintiff's argument against the validity of an instruction about which he had stated at trial, "The Plaintiff does not object to the instructions as given. We don't think it prejudices the Plaintiffs case. . . . I have no objection to the charge." The Court of Appeals, after quoting *Rule 51.02*, stated:

> Admittedly, if Plaintiff had made no comment on the portion of the charge complained of on this appeal, under 51.02 he could assign error to any portion of the charge in this Court. However, since the Plaintiff took affirmative action by asking for

> permission to amend his theory of the case to conform to the charge of the Court and approved the charge, we hold that Plaintiff's assignment of error in this Court is not authorized by *T.R.C.P. 51.02*.
>
> The situation is analogous to a party assigning error to a charge which he had requested. After the jury's verdict, it was too late to question the correctness of the charge.
>
> It is, therefore, unnecessary to discuss the cases cited and relied upon by Appellant relating to the correctness of the charge complained of.

Id. at 392. The facts of *Haddock* are directly on point with the facts in the instant case. Like the plaintiff in *Haddock*, the defendant here, Railroad, "took affirmative action" by explicitly acquiescing to both the disputed instructions and the verdict form. By saying "I agree with that" and "I don't like it, but it's the law" and "[i]t makes me a little ill every time I hear it, but that's where we are," Railroad, in the words of the *Haddock* court, "approved the charge[s]." After losing the case, Railroad attempted to "unring the bell" in its motion for a new trial, but it was too late. It invited the very error of which it now complains.

C.

Admittedly, the issues of invited error and waiver are complicated by the intervening precedent of

Sorrell. When the United States Supreme Court "applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Harper v. Va. Dept. of Taxation, 509 U.S. 86, 97, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993)*. This principle of retroactivity could be weakened by strict application of the rule prohibiting litigants from appealing errors that they invited, or did not object to, at trial, where the error was not apparent prior to the Supreme Court ruling. Such a holding would risk encouraging a flood of frivolous trial objections, since it would create a powerful incentive for attorneys to raise every currently invalid objection that could conceivably be vindicated by an unexpected Supreme Court ruling months or years in the future. On the other hand, completely eviscerating the doctrines of waiver and invited error[3] in all cases wherein the law changes during the pendency of an appeal would undermine the important purposes of those

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[3] Waiver and invited error are, as just noted, two distinct legal doctrines. Waiver is applicable to verdict forms and jury-instruction omissions, but inapplicable to erroneous instructions; invited error is applicable to all of the above. However, both doctrines involve situations where a litigant has failed to preserve an issue for appeal, whether through action (inviting error by acquiescing in a decision) or through inaction (waiving an issue by failing to object to a decision). Thus, for purposes of determining whether an intervening change in precedent excuses a litigant's failure to preserve an issue, there is little difference between waiver and invited error; the latter is, for these purposes, essentially just an enhanced version of the former.

doctrines. This latter point was implicitly recognized by the Tennessee Supreme Court in *McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992)*, the landmark case that replaced contributory negligence with comparative negligence in Tennessee. The High Court declared that "[t]he principles set forth today apply to (1) all cases tried or retried after the date of this opinion, and (2) all cases on appeal *in which the comparative fault issue has been raised* at an appropriate stage in the litigation." *Id. at 58* (emphasis added). In other words, parties who had not objected at trial to the all-or-nothing contributory negligence scheme were out of luck - even though that scheme was undoubtedly thought to be "the law" when their cases were tried.

Although the court in *McIntyre* did not specifically explain its reasoning with regard to retroactivity, it is likely that the court was cognizant of the fact that a raging debate about the merits of comparative versus contributory negligence had been ongoing well before the decision in *McIntyre*, and Tennessee was one of only a handful of states still using the traditional all-or-nothing approach until *McIntyre* brought Tennessee into line with the majority of other jurisdictions. In other words, it could not be said that the ruling was a *complete* surprise. Although contributory negligence remained the law until *McIntyre*, it was widely known that a change might be coming. Indeed, the court had put everyone on notice of a possible change fifteen years earlier by stating, "We do not deem it appropriate to consider making such a change [from contributory to comparative negligence] unless and until a case reaches us wherein the pleadings and proof present an issue of contributory negligence accompanied by

advocacy that the ends of justice will be served by adopting the rule of comparative negligence." *Street v. Calvert, 541 S.W.2d 576, 586 (Tenn. 1976)*. The Supreme Court quoted this language in *McIntyre* and stated, "Such a case is now before us." *833 S.W.2d at 56*. It seems fair, therefore, that the court limited the ruling's retroactivity to those cases where the issue had been raised at trial. In essence, this approach strikes a balance between the important purposes served by retroactivity, on the one hand, and waiver or invited error, on the other.

Such a balancing approach was championed by Judge Richard A. Posner of the United States Court of Appeals for the Seventh Circuit when he declared that "[a] party should be allowed to take advantage of a decision rendered during the pendency of his case, even if he had not reserved the point decided, *if the decision could not reasonably have been anticipated.*" *McKnight v. Gen. Motors Corp., 908 F.2d 104, 108 (7th Cir. 1990)* (emphasis added). That last point, we think, is crucial. Closing the door on waived arguments only where the intervening change in precedent "could . . . reasonably have been anticipated" respects and adheres to the spirit of both of the competing legal principles, requiring parties to raise all pertinent or potentially pertinent issues at trial but declining to penalize them for failing to raise issues whose resolution in their favor was totally unforeseeable. Moreover, with respect to Judge Posner's expressed fear that universal application of the waiver doctrine "would induce parties to drown the trial judge with reservations," *Id.*, his "could not reasonably have been anticipated" rule is philosophically consistent with *Rule 11* of both the federal and Tennessee Rules of Civil

Procedure, which prohibit attorneys from making a representation to the court unless "the claims, defenses, and other legal contentions therein are warranted by existing law *or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.*" *Tenn. R. Civ. P. 11.02(2)* (2007) (emphasis added); *see also Fed R. Civ. P. 11(b)(2)*. The *McKnight* rule avoids creating incentive for attorneys to make arguments that are "frivolous" when raised, but penalizes them for failing to make "nonfrivolous" arguments for changes to the law where such changes could reasonably have been anticipated.

D.

This analysis brings us, of course, to the question of whether the changes wrought by *Sorrell* could reasonably have been anticipated by Railroad. The answer, we think, is clearly yes. In fact, we can go a step further and say that the changes *were* anticipated. After all, as noted earlier, Railroad complained about the very question at issue here in its motion for a new trial. That motion was filed on October 27, 2006, more than two months *before* the *Sorrell* decision was announced. The law did not change during the 29 days between the above-quoted discussion - in which Railroad's attorney said of the disputed instructions, "I don't like it, but it's the law" - and the filing of Railroad's motion for a new trial, which argued that the instructions were "erroneous statements of the law" that "set[] up a clear double standard."

A brief timeline of events will help clarify matters. On May 15, 2006, the United States Supreme Court announced that certiorari had been

granted by the Court in the *Sorrell* case to address the following question: "Whether the court below erred in determining that the causation standard for railroad negligence under the Federal Employers Liability Act ('FELA') differs from the causation standard for employee contributory negligence." *Norfolk Southern Ry. Co. v. Sorrell, 547 U. S. 1127, 126 S. Ct. 2018, 2018, 164 L. Ed. 2d 778 (2006) (Mem.)*; 2005 U.S. Briefs 746, Brief of Petitioner (U.S. S. Ct. Briefs 2006). At that time, the pre-trial phase of the instant case was well underway.

More than three months *after* the Supreme Court agreed to hear *Sorrell*, Railroad in the instant case submitted its proposed jury instructions, which included equivalent standards of causation in Charge No. 13, and also its proposed verdict form, which included equivalent standards of negligence and causation. The trial below began on September 12, 2006.

On September 27, the trial court, in the course of scheduling a discussion of the proposed jury instructions for the following morning, stated:

> Well, I mean, [Railroad] may not object [to Employee's proposed instructions]. I mean, they may realize that's the case law. *I don't know the case law that well and I want y'all to make certain there's not error there.*

(Emphasis added.) As can be seen, the trial judge admitted being somewhat unfamiliar with the relevant case law and thus wanted to ensure that both parties had ample opportunity to raise and argue any legal objections they might have to the court's proposed instructions. Yet the next day,

September 28, when given that opportunity, Railroad's attorney conceded the instructions' legality, as already noted. He said, "I agree with" the causation instructions on the verdict form; he further stated, "I'm fine with [the negligence standard in the jury instructions] . . . I don't like it, but it's the law"; and he admitted that the divergent standards for negligence and contributory negligence "makes me a little ill every time I hear it, but that's where we are, Judge."

The following morning, September 29, shortly before charging the jury, the trial court asked the parties, "Is there any other part of the charge . . . Is there anything else you all saw that you didn't like[?]" Railroad's attorney responded that Railroad was satisfied with the instructions, "[w]ith some exceptions that we want to make probably after the charge is given about the Court's failure to give some things that we talked about." The court - clearly wanting to settle any important issues *before* giving the charge - replied, "Besides the fear of cancer charge, is there anything else in particular that you are unhappy about?" Railroad's attorney responded by asking the court to alter an instruction relating to foreseeability, but said nothing about the negligence and causation "double standard." At no point did Railroad indicate that it was "particular[ly] . . . unhappy" about that issue, nor indeed that it was "unhappy" at all. The court subsequently charged the jury with the now-disputed instructions and gave the jury the now-disputed verdict form. When Railroad made its promised exceptions, shortly after the jury was charged, it did *not* except to the court's refusal to give the jury its Charge No. 13, the proposed instruction that would have provided for a uniform

causation standard. Railroad *did* except to the court's refusal to use the more detailed verdict form that Railroad had submitted, but this exception appears to have been based on other grounds (specifically, the "fact of disease" issue that we will address in the next section of this opinion). In sum, during the time period between Railroad's concession and the end of the trial, the record shows no indication that Railroad ever told the court it had changed its mind about the previously conceded legality of the now-disputed instructions and verdict-form language.

The jury returned its verdict later that day, September 29. The court's judgment was entered on October 2. Approximately one month later, on October 27, Railroad filed its motion for a new trial. It stated, as one of 16 reasons why a new trial should be granted, that "[t]he Court erroneously charged the jury on the standard of care to utilize in assessing the negligence of [Railroad], and then compounded the error by 1) articulating a separate and different standard of care for assessment of Plaintiff's negligence and 2) emphasizing the errors by restating them on the jury verdict form." The memorandum in support of the motion elaborates on this claim, asserting that the jury was presented with a "clear double standard." Railroad argued in its memorandum as follows:

> In short, the Court's charge presents a relaxed "even in the slightest" negligence standard for defendant [Railroad] but a normal pure "negligence" standard for the Plaintiff.

> [Railroad] respectfully submits both aspects of the charge are *erroneous statements of the law* and clearly prejudicial.

(Emphasis added.) It is worth reiterating that, exactly one month earlier, Railroad's attorney had said of the very instruction at issue, "I don't like it, but it's the law." No United States Supreme Court opinion was released during the intervening month that could have converted the instruction's contents from "the law" into "erroneous statements of the law." Rather, it seems that Railroad simply changed its mind. In any event, Railroad's motion for a new trial cites, among other cases, Page v. St. Louis Southwestern Ry. Co., *349 F.2d 820 (5th Cir. 1965)* in support of its contention that the previously agreed-to instructions were in fact erroneous. Railroad described *Page* as "a clear ruling that the standard of negligence for employee and employer is the same under FELA." This citation is significant because, when *Sorrell* was decided 75 days later, the majority opinion referred to *Page* as "[t]he most thoughtful treatment" of the issue, and essentially adopted *Page's* reasoning.

The Supreme Court released its *Sorrell* opinion on January 10, 2007. Less than two weeks later, on January 23, the trial court in the instant case rejected Railroad's motion for a new trial. The court noted the brand-new *Sorrell* opinion, stating that Railroad had "supplemented [its] argument" by bringing the case to the court's attention. However, the trial court stated that "[a] review of the case does not change the Court's opinion as to the appropriateness of the charge." The court then

essentially cited a waiver or invited error theory in support of its decision, noting, "The Court held several jury charge/verdict for[m] conferences with counsel before the charge was communicated to the jury."

Railroad filed its notice of appeal on February 9, 2007. Railroad now argues that the trial court should have used Railroad's proposed instructions, and that, although Railroad subsequently agreed to the instructions that the court used instead, *Sorrell* so fundamentally changed the law that it is unfair to hold Railroad to the normal rules of waiver and invited error. Yet under the test already articulated - whether the change in the law "could . . . reasonably have been anticipated" - it is abundantly clear that Railroad cannot now claim the benefit of *Sorrell* after having so explicitly disavowed its legal underpinnings at trial.

E.

Railroad's briefs are strikingly inconsistent in their characterization of *Sorrell*'s impact on the law and, by implication, the foreseeability of the High Court's ruling in that case. On the one hand, Railroad states that *Sorrell "confirmed what most courts had already held* - that railroads and employees should be subject to equivalent causation standards in determining negligence[.]" (Emphasis added.) Later, Railroad asserts that *Sorrell* "resolved a long-running split of authority[.]" Yet Railroad goes on to assert that it "should not now be penalized in this appeal because at trial it followed *then-prevailing law* on the standard of causation and negligence for railroad FELA liability." (Emphasis added). Railroad adds that it "could not have invited

error because the trial court's ruling was consistent with *the governing law* at the time of trial." (Emphasis added). Needless to say, the notion that Railroad reasonably relied upon settled, "governing," "then-prevailing" pre-*Sorrell* law, which *Sorrell* then unexpectedly overturned, is difficult to square with the assertion that *Sorrell* "confirmed what most courts had already held." In addition, it is difficult to understand how Railroad can now rely on the jury instructions that it submitted at trial, before *Sorrell*, as being the proper application of post-*Sorrell* law, yet contend that its acquiescence at trial to the court's instructions should be disregarded because *Sorrell* so drastically and unexpectedly changed the law. If that is the case, why did Railroad submit legally unsupportable instructions? Railroad cannot have it both ways.

The bottom line is this: Railroad was given ample opportunity to argue that its submitted instructions were proper under existing law, including *Page* and the various other cases that represent, in Railroad's words, "what most courts had already held" before *Sorrell*. Presented with this opportunity to convince the trial court of its position, Railroad instead chose - despite having submitted instructions that it claims are now proper - to concede the point, explicitly declaring the court's instructions legally correct. The trial court, which had previously told the attorneys that "I don't know the case law that well and I want y'all to make certain there's not error there," understandably saw no need to pursue this particular issue further. After all, Railroad had conceded the point, and there were many other contested issues to resolve in this complex case. Yet now, having invited the result that it now describes

as error, Railroad seeks to revive the issue. This it cannot do. We will not allow Railroad to change its position on appeal after specifically conceding the point in question because of a supposedly drastic change in the law that Railroad should have anticipated, and indeed *did* anticipate (albeit inconsistently). The propriety of negligence and causation instructions that impose a "double standard" on plaintiffs and defendants under FELA was an unresolved legal issue that Railroad needed to preserve at trial if it wished to assert error on appeal, and Railroad failed to do so. Therefore, we do not reach the substantive merits of the claim.[4]

IV.

Railroad's third issue requires a much shorter discussion. Railroad claims that the verdict form improperly presupposes the fact of Employee's claimed diseases, toxic encephalopathy and asbestosis. We quote again from the first two questions on the form, with a different emphasis this time:

> 1. Do you believe from the evidence that CSX was negligent, even the slightest, and such negligence was a cause, in whole or in part, of *the asbestosis the Plaintiff claims*
>
> YES NO

---

[4] We emphasize again that our opinion does not presuppose anything about the outcome of this issue if Railroad had properly preserved it. We simply do not decide that point because Railroad's invited error pretermits it.

> 2. Do you believe from the evidence that CSX was negligent, even the slightest, *and such negligence was a cause, in* whole or in part, of *the toxic encephalopathy the Plaintiff claims*
>
> YES NO

(Emphasis added.) Railroad argues that the court erred by consolidating the issue of whether Plaintiff has the diseases in with the question of whether Railroad negligently caused those alleged diseases. This is in contrast to Railroad's proposed verdict form, which begins with the questions, "Do you find from a preponderance of the evidence that the Plaintiff suffers from toxic encephalopathy?" and "Do you find from a preponderance of the evidence that the Plaintiff suffers from asbestosis?" Only then does it proceed to ask about negligence and causation. Railroad contends that the court's approach "effectively and erroneously granted Plaintiff a directed verdict on this issue[.]"

We disagree. The necessary first step in answering the questions posed by the verdict form is to decide whether Employee's claims of disease are proven by the evidence. This necessity is implied by the form's language and by common sense, and nothing in the court's language suggests otherwise. The form does not predetermine the question of whether Employee has the diseases; it states only that Employee has made a "claim," not that the claim is true. Merriam-Webster defines the verb "to claim" as meaning "to assert especially with conviction and in the face of possible contradiction or doubt." *Webster's Third New International Dictionary*

414 (1993). Railroad certainly did try to contradict the claims. Indeed, in its closing argument, Railroad argued as follows:

> He doesn't have asbestosis, the disease he has sued CSX for, therefore he can't win that part of this case.
>
> Now, you can dispose of the asbestos piece of this case pretty quickly once you get back in the jury room. You elect a foreperson. One thing you can do is say, all right, let's take a vote. Let's take a quick vote. Do we believe Mr. Hensley has asbestosis or not. If all of you say no, then you're done. You can start talking about solvents.

This is just one example. Both parties made clear, throughout the trial and in closing arguments, that whether Employee suffered from the diseases in question was very much a disputed issue. We see no reason to imagine that the jury was confused about the nature of its duty to determine the facts on these crucial issues, especially given how vigorously each side argued them.

In summary, the verdict form states that Employee *claims* to have the diseases in question, and asks the jury to make an overall determination of whether he is entitled to a verdict in his favor on these *claims*. Certainly, the court *could* have broken these questions down into their component parts, but it was not obligated to do so, and its decision to use a more succinct form did no harm to anyone. If the answer to either question (or both) had been "no," we might have been left wondering whether the jury had

concluded that the disease did not exist, or rather that it existed but the Railroad was not responsible for it. But the jury answered "yes," which leaves no doubt about what facts they found. It is implausible to suppose that the jury believed Railroad was the negligent cause of a nonexistent disease. In any event, it is reasonable to assume the jury knew the meaning of the word "claim," and, as such, we find no error here.

V.

In its fourth issue, Railroad argues that Employee's evidence of a compensable "fear of cancer" failed to meet the requirement of *Norfolk & W. Ry. Co. v. Ayers, 538 Us. 135, 157, 123 S. Ct. 1210, 155 L. Ed. 2d 261 (2003)*, that it be "genuine and serious," and that the trial court erred by failing to instruct the jury on that standard. We will address the second point first, as it is more easily dispensed with.

The Court in *Ayers* held that a complainant with asbestosis can recover damages under FELA for fear of cancer when that fear "stems from a current injury," *id. at 159*, with the "important reservation" that "[i]t is incumbent upon such a complainant . . . to prove that his alleged fear is genuine and serious." *Id. at 157*. However, the Court declined to go further, specifically limiting its holding to the above-stated narrow issue. As the Missouri Court of Appeals explained in *Hedgecorth v. Union Pac. R.R. Co., 210 S.W.3d 220, 228-29 (Mo. Ct. App. 2006)*, "*Ayers* does not require . . . instructions detailing or explaining damages based on a fear of developing cancer. . . . [T]he Court in *Ayers* did not discuss or authorize jury instructions on this issue, but merely ruled on

substantive law." We agree with this analysis of *Ayers*. Railroad does not point us to any other cases containing a requirement that the *Ayers* test or a similar standard be communicated to the jury, nor have we found any. We suspect this is because such a requirement would make little sense.

One purpose of the "genuine and serious" requirement, we believe, is to protect defendants from excessive verdicts based on appeals to jurors' passions with respect to the deeply emotional issue of cancer. Because the mere suggestion of a possibility of cancer has the potential to evoke raw emotions, a juror may be swayed by the barest shred of evidence that a defendant has caused a plaintiff to suffer an increased risk and/or fear of cancer, and may be tempted to overcompensate the plaintiff for such a risk or fear. In light of this reality, little if any purpose would be served by instructing the jury that the plaintiff's fear must be "genuine and serious." Juries do not routinely grant multimillion-dollar awards for injuries that the jurors regard as non-genuine or unserious. Any juror who might be predisposed to grant a large award based on shaky evidence of a fear of cancer is unlikely to be swayed by the language of *Ayers*. Rather, it is for the courts to serve as gatekeepers in this regard, to ensure that fear of cancer claims do not *go* to the jury unless there is credible evidence of a "genuine and serious" fear.

That brings us back to the question of whether Employee introduced sufficient evidence to support a fear of cancer claim under *Ayers*. We find that he did. Railroad does not dispute the well-established link between asbestosis and an increased risk of cancer. However, as Railroad correctly notes, establishing

that increased risk is not enough; Employee must also prove that he had a genuine and serious fear of cancer. On this point, Railroad makes much of Employee's testimony that he has "some concern" over getting cancer "in the back of my mind," like "a little cloud" hanging over his head. Railroad compares this testimony to the evidence in *Seaford v. Norfolk S. Ry. Co., 824 N.E.2d 94, 111-12, 159 Ohio App. 3d 374, 2004 Ohio 6849 (Ohio Ct. App. 2004), rev'd on other grounds, 106 Ohio St. 3d 430, 2005 Ohio 5407, 835 N.E.2d 717 (Ohio 2005)*, wherein the plaintiff was denied fear-of-cancer damages under the *Ayers* test because there was no evidence beyond a single, vague statement of "worry" and "concern." However, in the instant case, vague statements of concern do not represent the full extent of Employee's testimony. He also testified that he experiences "anxiety" - a term referenced in *Seaford*, in contrast to mere "worry" and "concern," as part of the dictionary definition of fear: "the general term for the anxiety and agitation felt at the presence of danger." *824 N.E.2d at 112* (quoting *Webster's New World Dictionary*). Employee also testified that he takes Xanax for his anxiety, in part because of his fear of cancer:

> Q: For your anxiety, why did [Dr. Perry] give [Xanax] to you? What kind of anxiety do you have that you have to take medicine for?
>
> A: Well, I just feel like, you know, my chest - I get tightness in my chest and can't - I smother and I sit and worry. I think about - you know, this asbestos in my lungs, it's apt to cause - I don't say

> I've got it, but it's apt to cause cancer of the lungs.

Railroad asserts that "[t]his testimony . . . was subsequently impeached on cross-examination," when Employee testified that he began taking Xanax before being diagnosed with asbestosis. Yet that fact does not necessarily preclude a jury finding that at least *part* of the reason Employee has *continued* to take Xanax is because of his fear of cancer. Such a finding would be a reasonable inference that a jury could justifiably make from the evidence presented. Similarly, Dr. Perry's testimony that he does not know the cause of Employee's anxiety does not, as a matter of law, establish that no jury could possibly conclude that fear of cancer was one of the causes. Railroad's assertion that "there is no evidence that [Employee's] use of medication was in any way related to a concern about getting cancer" is simply incorrect. Employee's testimony is evidence of that proposition; it is the province of the jury to weigh that evidence against the countervailing evidence, including Railroad's attempts to impeach Employee's testimony. We are not empowered to re-weigh the evidence and substitute our judgment for that of the jury. We simply hold that, if the jury reasonably believed Employee's evidence, it could have found that a genuine and serious fear of cancer existed. That is enough to sustain the verdict.

VI.

Railroad's fifth and final issue - that Employee's closing argument was unduly prejudicial and inflammatory - merits little discussion. Railroad contends that, contrary to FELA's bar on punitive

damages, Employee tacitly encouraged the jury to punish Railroad, rather than merely compensating Employee, by making an impermissible "send a message" argument. Having read the transcript of the argument, we agree with Employee that Railroad is taking individual quotes out of context and is painting the argument as far more inflammatory than it really was. It seems clear to us that Employee's argument was focused on establishing the elements of his claim, and that any rhetorical flourishes were within the boundaries of permissible argumentation. Moreover, we note that the trial court - which, upon hearing the argument first-hand, was in a far better position than we are to assess whether it was prejudicial - found no merit in Railroad's claim that the argument was improper. Such issues are generally left to the trial court's broad discretion. *Doochin v. U.S. Fid. & Guar. Co., 854 S.W.2d 109, 115-16 (Tenn. Ct. App. 1993).* In any event, we too find this claim to lack merit, and thus decline Railroad's invitation to order a new trial on this basis.

VII.

For all the foregoing reasons, the judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant, CSX Transportation, Inc. This case is remanded to the trial court for enforcement of the court's judgment and for collection of costs assessed below, all pursuant to applicable law.

CHARLES D. SUSANO, JR., JUDGE

APPENDIX N

ORDER ON POST-TRIAL MOTIONS

BLACKBURN, XON
VS
ILLINOIS CENTRAL RAILROAD COMPANY
2004L 000024

Atty Gavin for plaintiff, Atty Kurz for defendant.

Post Trial Motion re Copple, Heinrichsmeyer and Hyatt argued and denied except as to set-offs of prior settlement against verdicts. Verdict for Copple is reduced by $4415.50, verdict for Heinrichsmeyer is reduced by $4452.00 and verdict for Hyatt is reduced by $3177.50.

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No. 08-271

Supreme Court, U.S.
FILED
SEP 30 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ILLINOIS CENTRAL RAILROAD COMPANY,

Petitioner,

v.

DELBERT COPPLE, CARL HEINRICHSMEYER, and DONALD HYATT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT

BRIEF IN OPPOSITION

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REASONS FOR DENYING THE PETITION

I. *AYERS* ANSWERED THE QUESTION PETITIONER PRESENTS

Petitioner's Petition For A Writ of Certiorari in essence requests this Court to limit the recovery of damages for genuine and serious fear of cancer in Federal Employer's Liability Act (FELA), 45 U.S.C. §§ 51 *et seq.*, asbestosis suits to those instances wherein the fear manifests itself in the claimant by physical disabilities that are confirmed by objective evidence. In doing so, Petitioner presents the same question that this Court answered in *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 157, 155 L. Ed. 2d 261, 281, 123 S. Ct. 1210, 1223 (2003): Whether an FELA Plaintiff, who has been diagnosed with asbestosis, but not cancer, may recover damages for fear of cancer without physical manifestation of the claimed emotional distress.

The *Ayers* decision clearly answered the question presented by Petitioner and stated, "Our answer is yes, with one important reservation. . . . It is incumbent upon such a complainant, however, to prove that his alleged fear is genuine and serious." *Ayers*, 538 U.S. at 157. In the trial below, the trial court faithfully followed this ruling by instructing the jury that if Respondents met their burden of proof, the jury could compensate Respondents for "The genuine and serious fear of cancer experienced and reasonably certain to be experienced in the future." Pet. App. 63a.

The *Ayers* decision was consonant with American common law summarized in The Restatement (Second) of Torts § 456 Comment c, cited in *Ayers*, 538 U.S. at

148-49. *See, also, Ayers*, 538 U.S. at 149-51 nn.8-10. Petitioner requests this Court to roll back its *Ayers* decision by grafting a restrictive definition onto "genuine and serious." The definition sought by Petitioner would be nothing more than a requirement that there be physical manifestations of the fear of cancer, proved by objective evidence, before the claimant may recover for this element of the claimant's damages. The *Ayers* decision clearly established that physical manifestations are not required and no purpose would be served by granting Petitioner's Petition For A Writ Of Certiorari.

Petitioner erroneously asserts that in prior decisions, this Court has held that "damages for emotional distress are recoverable only where the emotional injury complained of is serious and supported by more than complainant's subjective testimony." Petition at 11. Petitioner relies on this Court's decisions in *Atchison, T. & S.F. Ry. Co. v. Buell*, 480 U.S. 557, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987), *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 114 S.Ct. 2396, 129 L.Ed.2d 427 (1994), and *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 117 S.Ct. 2113 (1997) for its erroneous application of this broad proposition to the instant action.

While the Court's decisions in *Buell*, *Gottshall*, and *Buckley* concerned recovery for emotional distress under the FELA, none of these decisions held that to establish sufficient evidence of emotional distress damages in an FELA asbestosis action, objective evidence of the emotional distress must be introduced. *Buell* addressed the issue of "whether the possibility of

pursuing a labor grievance under the RLA (Railway Labor Act) deprives an employee of his right to bring an FELA action." *Buell*, 480 U.S. at 559. The *Gottshall* Court decided the issue of whether a claim may be stated under the FELA for negligent infliction of emotional distress and, if so, under what circumstances may such a claim be stated. *Gottshall*, 512 U.S. at 542. *Buckley* presented the issue of whether employees negligently exposed to asbestos, but not diagnosed with asbestos illness, fit within the parameters established in *Gottshall*. *Buckley*, 512 U.S. at 426-27. It was *Ayers* that answered the question Petitioner again presents and no purpose would be served in re-visiting what has already been decided.

Petitioner has not cited any authority to show that any court, federal or state, has held that an instruction must be given to limit "genuine and serious" as Justice BREYER limited that term in his *Ayers* dissenting opinion. *Ayers*, 538 U.S. at 187. To the contrary, two courts, in addition to the Appellate Court of Illinois in this action, have held that such an instruction is not warranted. *Hensley v. CSX Transp., Inc.*, 2008 WL 683755, *16 (Tenn. Ct. App. 2008) and *Hedgecorth v. Union Pacific R.R. Co.*, 210 S.W. 3d 220, 227 (E. D. Mo. 2007), *cert. denied* 128 S.Ct. 59, 169 L.Ed.2d 15 (2007). *See, also, Jones v. CSX Transp.*, 337 F.3d. 1316, 1317 (11th. Cir. 2003) wherein the Eleventh Circuit Court of Appeals, following *Ayers*, reversed the district court's ruling that there must be objective manifestation of emotional distress before there can be a recovery for fear of cancer.

II. The Limitation Sought By Petitioner Is Both Unnecessary And Inconsistent With The Purpose Of The FELA

Petitioner asserts that a restrictive definition of "genuine and serious" is necessary to create uniformity in the application of the FELA. Such an argument, however, wrongfully pre-supposes that the common words "genuine and serious" cannot be understood by those courts applying the *Ayers* decision. To graft the restrictive definition advocated by Petitioner onto the plain meaning of "genuine and serious" would unnecessarily restrict a lower court's ability to apply the *Ayers* principle to the unique facts that are presented to it with each new case.

Trial courts and finders of fact are as capable of determining whether the claimed emotional distress is genuine and serious as they are capable of determining whether a claimant has experienced physical pain and/or disability because of physical injuries. *Cf. Buckley*, 521 U.S. 424 at 452, (GINSBURG, J., concurring in part and dissenting in part; "Fact finders in tort cases routinely face questions lacking indubitably clear answers . . . ."). The subjective elements of physical pain and suffering and disability are not restrictively defined and no purpose would be well served by further defining the genuine and serious fear of cancer.

Petitioner also erroneously asserts that if narrow limits are not imposed on the right to recover damages for the genuine and serious fear of cancer, the American railroad industry will be faced with limitless liability that will destroy its ability to compensate those employees

who actually develop cancer because of exposure to asbestos during their employment. This prophesy of dire financial burden assumes that the universe of potential FELA fear of cancer claimants is limitless. To the contrary, the universe is first limited by the application and operation of the FELA and, within the resulting group, further limited by this Court's decisions in *Buckley* and *Ayers* to those claimants who have been diagnosed with asbestosis and whose emotional distress is genuine and serious. *See, Gottshall*, 512 U.S. 559-60, 570-71 and 572 (GINSBURG, J., dissenting).

Petitioner cites no authority for any railroad's projected inability to compensate those suffering from mesothelioma as a result of the railroad's violation of the FELA. The information cited by Petitioner in its Petition about the impact of asbestos disease litigation clearly concerns the impact on sellers and manufacturers of asbestos products and demonstrates nothing about the impact of FELA asbestos litigation on railroads. Petition at 16-17. Petitioner fails to show that the proposed limitation on the recovery for genuine and serious fear of cancer is necessary to preserve the assets of American railroads for future claimants afflicted with asbestos cancer.

The proposed limitation on the recovery of damages for genuine and serious fear of cancer would also be inconsistent with the Congressional intent of the FELA. This court has noted that Congress in enacting the FELA did not intend a "static remedy, but one which would be developed and enlarged. . . ." *Kernan v. American Dredging Co.*, 355 U.S. 426, 432, 78 S.Ct. 394, 2 L.Ed.2d 382 (1958). This Court has also noted that it

applies a liberal construction to the FELA in order to achieve its humanitarian purpose. *Urie v. Thompson*, 337 U.S. 163, 180, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949) and *Buell*, 480 U.S. at 562.

The limitation on genuine and serious fear of cancer damages advocated by Petitioner would all but eliminate recovery for the mental anguish FELA asbestosis victims experience over their increased risk of future cancer. It is undeniable that one afflicted with asbestosis is at an increased risk of various cancers because of the asbestos exposure and/or asbestosis.[1] It is also undeniable that the prospect of future cancer can cause emotional distress because cancer is "unusually threatening and unusually frightening." *Buckley*, 521 U.S. at 435. However, it is also true that human nature is such that the emotional distress may not physically manifest itself, in all cases, to the degree Petitioner claims is necessary for a recovery. The narrowing of the FELA remedy sought by Petitioner would be incompatible with the remedial purpose of the FELA because it would artificially foreclose that class of physically injured employees who have experienced genuine and serious emotional distress from recovering damages only because their distress has not manifested itself by physical disability.

1. Respondents' uncontested evidence at trial established this fact.

III. The Trial Court Properly Instructed The Jury On The Genuine And Serious Fear Of Cancer Damages Element

Petitioner claims that the form of the jury instructions given by the trial court was improper. The format of jury instructions in an FELA case is a procedural matter for the state to regulate. *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill.2d 260, 274, 775 N.E.2d 964, 973, 266 Ill. Dec. 892, 901 (Ill. 2002). *See, also, Hedgecorth v. Union Pacific R.R. Co.*, 210 S.W.3d 220, 227 (E. D. Mo. 2007) *cert. denied* 128 S.Ct. 59, 169 L.Ed.2d 15 (2007). Illinois Supreme Court Rule 239 requires the use of Illinois Pattern Jury Instructions unless the court determines that a pattern instruction does not accurately state the law.

The jury instructions tendered by Petitioner that would have restrictively defined "genuine and serious fear of cancer", were properly refused because they were procedurally defective. Thus, the instructions would have been refused even if they had properly stated the substantive law.

Petitioner's Instruction Number 4 contained the term "must demonstrate." Pet. App. 64a. Respondents properly objected to this tendered instruction because the term "must demonstrate" is vague, argumentative and would have placed a higher burden of proof on Respondents than that imposed by Illinois Pattern Jury Instruction 21.01 (2006). Illinois Pattern Jury Instruction 21.01 does not contain the term "must demonstrate" and the trial court correctly sustained

this objection noting that to inject the term, "must demonstrate", into the pattern jury instructions would, at best, have been confusing. For this procedural reason alone the trial court properly refused Petitioner's Instruction Number 4.

The trial court also properly refused Petitioner's Instruction Number 5A because it is duplicative of the damages and burden of proof instructions. Respondents' Instructions No. 31B, 32A, 33B (the damages instructions), and No. 36 (the burden of proof instruction) clearly set forth that before any Respondent recovered for an element of damages, he was required to meet his burden of proof that he had experienced that element of damages. Pet. App. 63a. Petitioner's Instruction Number 5A would have improperly highlighted one element of the damages sought. The trial court correctly recognized that to repeat one element of damages outside the series of pattern instructions on damages found at Illinois Pattern Jury Instructions 30.01 *et seq.* would have put improper emphasis on the element of damages. *See, Podoba v. Pyramid Elec., Inc.*, 281 Ill. App.3d 545, 667 NE.2d 167, 172, 217 Ill. Dec. 374 (5th Dist. 1996) (Trial court committed reversible error when it gave a non-Illinois Pattern Jury Instruction that gave undue emphasis to an element of damages).

Petitioner urges this Court to find that the trial court's damages instructions were erroneous because the inclusion of the term "The genuine and serious fear of cancer experienced and reasonably certain to be experienced in the future" strongly suggested that a professed fear of cancer was "*ipso facto* genuine and

serious." Petition at 13. This is the first time Petitioner has raised this objection to the trial court's damages jury instructions. No such objection to the instructions was made at trial and, therefore, the Illinois Appellate Court did not consider this argument. This Court has often refused to consider issues that were not adequately addressed and developed by lower courts and it should not do so in this action *E.g.*, *Buell*, 480 U.S. at 570-71.

The damages jury instructions were constructed from Illinois Pattern Jury Instructions Nos. 30.01, .04, .04.01, .04.02, .05, and .06. The instructions began with the phrase, "If you decide . . . ." This phrase is defined in Illinois Pattern Jury Instruction 21.01 which states, "When I say . . . 'if you decide,' I mean you must be persuaded, considering all the evidence in the case, that the proposition on which [the party] has the burden of proof is more probably true than not true." Illinois Pattern Jury Instruction 21.01 (2006). Each damages instruction ended with the admonishment "Whether any of these elements of damages has been proved by the evidence is for you to decide." Pet. App. 63a. Clearly, the form of the damages instructions made it clear that each Respondent carried the burden of proving each element of his claimed damages, including the genuine and serious fear of cancer.

IV. Respondents Introduced Sufficient Evidence For An Instruction On The Genuine And Serious Fear Of Cancer

The Petition For A Writ Of Certiorari should be denied because in it Petitioner does nothing more than request this Court to re-weigh the evidence introduced at trial. In doing so, Petitioner misrepresents the record below by not fully presenting the evidence introduced by Respondents at trial concerning the fear of cancer. On the fear of cancer subject, Respondents testified as follows:

Mr. Copple testified that he was concerned about his lungs and the prospects of cancer as a result of his asbestosis and that he had consulted about his concern with his physician, Dr. Carlos Ezpeleta. He had periodic appointments with Dr. Ezpeleta for monitoring his condition. Mr. Copple testified that he had learned of the various diseases associated with asbestos by reading about the subject following Dr. Alvin Schonfeld's examination and before trial. Mr. Copple testified, "I'm concerned about it. I'm even worried about it .... I do think about it a lot."

Mr. Heinrichsmeyer testified that Dr. Schonfeld advised him to keep track of Mr. Heinrichsmeyer's diagnosed asbestosis and, as a result, he has routinely visited his doctors since Dr. Schonfeld's examination. Mr. Heinrichsmeyer testified that he has provided Dr. Schonfeld's report to his personal physicians. Mr. Heinrichsmeyer testified that he is concerned about his future as a result of his asbestosis and the prospect of cancer and that he is also concerned about the security of his family.

Mr. Hyatt testified that after Dr. Schonfeld's examination of him, Dr. Schonfeld talked to him about asbestos and cancer and told Mr. Hyatt that he "should get checked." Mr. Hyatt testified that he discussed the issue of future cancer with his personal physician, Dr. Collins, and was told that he would get an annual chest x-ray and that they would "keep a handle on it." My Hyatt also testified that getting cancer has been on his mind all of the time. He explained that when he developed chest symptoms in 2006 his first thought was that it was cancer until the symptoms were later diagnosed by Dr. Collins as resulting from pneumonia.

Dr. Douglas Pohl, a pathologist, testified in detail as to what cancers are caused by asbestos exposure. Dr. Schonfeld gave similar testimony. Dr. Pohl further testified that it would be medically reasonable for each Respondent to be concerned about his prospects of developing an asbestos-related cancer in the future.

Dr. Schonfeld and Dr. Pohl testified about the type of future medical care that would be required to monitor Respondents' asbestosis and increased risks of cancer. Specifically, Dr. Schonfeld testified that each Respondent would require periodic x-rays, medical examinations and keeping current on colonoscopies. Dr. Pohl gave similar testimony.

The above evidence is substantially similar to that presented in *Hensley v. CSX Transp., Inc.*, 2008 WL 683755, *16-17 (Tenn. Ct. App. 2008). In *Hensley*, the Appellate Court noted that the Plaintiff testified about his concern about future cancer and that he was taking Xanax prescribed by his doctor. The *Hensley*

court ruled that this evidence exceeded that introduced in *Seaford v. Norfolk S. Ry.*, 159 Ohio App.3d 374, 824 N.E.2d 94 (Ohio Ct. App. 2004), *rev'd. on other grounds*, 106 Ohio St.3d 430, 835 N.E.2d 717 (Ohio 2005) and found that sufficient evidence had been introduced to support submission of the fear of cancer element of damages to the jury. The Illinois Appellate Court's decision in this action is consistent with the *Hensley* decision.

Petitioner portrays the *Seaford* decision as evidence that some division exists in the lower courts over how to define and/or apply the term "genuine and serious." *Seaford* represents nothing more than one court's application of the *Ayers* standard to the evidence uniquely before it. In *Seaford*, the only evidence of fear of future cancer was the Plaintiff's testimony, "I worry about it and the family is concerned about it." *Seaford*, 824 N.E.2d at 111. As noted above, Respondents each introduced substantially more evidence. *See, Buckley*, 521 U.S. at 445 (GINSBURG, J., dissenting and suggesting that seeking professional help, as Respondents did in this case, is some evidence of severe emotional injury).

At trial, Petitioner consented to instructing the jury that if Respondents sustained their burden of proving damages for the fear of cancer, they could be compensated for this loss. During the preliminary conference on instructions, Petitioner's counsel agreed that the damages instructions should include the element of fear of cancer. Petitioner's counsel stated, "I don't have a problem with you using fear of cancer. Yes. That's right." Petitioner's assertion in this Court that insufficient evidence was introduced at trial for

submission of the fear of cancer damages element to the jury is inconsistent with its agreement at trial that the jury be instructed on this element of damages.

CONCLUSION

For the reasons stated above, Respondents, Delbert Copple, Carl Heinrichsmeyer, and Donald Hyatt, pray that the Petition For A Writ Of Certiorari be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ILLINOIS CENTRAL RAILROAD COMPANY,
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v.

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and DONALD HYATT,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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IN THE

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Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

The Association of American Railroads (AAR) is an incorporated, nonprofit trade association represent-

[1] AAR has provided notice of its intent to file a brief to the parties in accordance with Rule 37.2(a). Both parties have consented to AAR's filing of an *amicus curiae* brief. Letters expressing such consent have been filed with the Clerk of the Court. No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

ing the nation's major freight railroads and Amtrak. AAR's members operate approximately 78 percent of the rail industry's line haul mileage, produce 94 percent of its freight revenues, and employ 92 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies and the courts on behalf of the railroad industry.

This case, arising under the Federal Employers' Liability Act (FELA), presents such an issue. FELA, a federal negligence statute, takes the place of workers' compensation in the railroad industry. FELA presents unique issues and problems for railroads because, as a negligence law, it differs fundamentally from the no-fault compensation systems that cover virtually all other U.S. industries. Each year thousands of FELA claims and lawsuits, like the case below, are asserted against AAR member railroads, to which they devote substantial legal and financial resources: all told, the railroads spend close to a billion dollars annually in the payment and defense of claims brought under FELA. Because FELA litigation is an ongoing event for all major railroads, AAR has a strong interest in assuring that lower courts do not improperly expand railroad liability under FELA.

The issue raised in this case can arise in thousands of FELA cases and can significantly impact the damage awards in those cases. In *Norfolk & Western Ry. Co. v. Ayers*, this Court held that FELA plaintiffs with symptoms of an asbestos-related injury could recover damages for reasonable fear of cancer so long as that fear was "genuine and serious." The Court also made clear that it anticipated that lower courts would utilize verdict control devices to limit fear of

cancer claims to only those supported by evidence of genuine and serious emotional distress. In this case, the court below affirmed the trial court's decision to permit the plaintiffs' fear of cancer claims to go to the jury, supported only by plaintiffs' testimony of generalized worry, uncorroborated by any objective evidence. If courts continue to take this kind of approach to claims for fear of cancer—and there is a split among lower courts on this issue—it will open the floodgates to such claims in virtually all of the thousands of FELA asbestos cases pending against AAR member railroads, an outcome clearly not intended by this Court's decision in *Ayers*. In its brief, AAR will urge this Court to grant certiorari in order to provide much needed guidance to lower courts in order to avoid this result.

All of AAR's large members, who are facing numerous FELA claims in which fear of cancer damages likely will be sought, have a strong interest in the issue presented by this case. When AAR participates as *amicus curiae* in a FELA case like this one, it brings a broad, industry-wide perspective to the issue before the court. AAR works closely with its member railroads on a host of issues arising under FELA. AAR also maintains a close liaison with the National Association of Railroad Trial Counsel, an organization of over 900 attorneys representing railroads nationwide in personal injury litigation. Thus, AAR is thoroughly familiar with the trends and key issues that confront its members in FELA litigation.

As a trade association representing the nation's major railroads, AAR can assist this Court in understanding the impact of the lower court's ruling by bringing the perspective of an entire industry, which often is different from that of the individual litigant,

who may not be in a position fully to be aware of a case's impact on the industry as a whole. In this case, AAR has an interest not only in assisting the petitioner in obtaining relief from an erroneous decision, but also in assuring that an important federal law is not misconstrued to the detriment of railroads in the future.

SUMMARY OF THE ARGUMENT

This Court should grant the petition because this case presents an issue that will impact thousands of cases arising under the Federal Employers' Liability Act. 45 U.S.C. §§51-60. This Court has held that plaintiffs who have an asbestos-related injury may recover pain and suffering damages for fear of contracting cancer, but only if that fear is genuine and serious. The Court made it clear that this qualification was intended to require trial courts to limit the number of cases where plaintiff would qualify for such damages. In permitting the plaintiffs' fear of cancer claims to go to the jury based only on their testimony of generalized concern and worry, the court below failed to play the gatekeeper role envisioned by this Court. To date, lower courts have taken different approaches to fear of cancer claims in FELA cases, but several have done little to ensure that only claims of genuine and serious fear go to a jury or that juries are properly instructed when addressing such claims.

There are thousand of FELA asbestos claims pending against railroads. In addition, there are many other FELA cases pending where the plaintiff has alleged exposure to a substance, other than asbestos, which is claimed to cause cancer. In virtually all of these cases, damages for fear of cancer are

likely to be sought. Without guidance from this Court on the proper definition of "genuine and serious" fear, and the nature of the evidence sufficient to bring such a claim to a jury, lower courts will continue to address this issue in a non-uniform manner. Moreover, if courts adopt the approach followed by the court below, it will open the floodgates to fear of cancer claims, exactly the opposite of the result that this Court envisioned.

ARGUMENT

THIS COURT SHOULD GRANT CERTIORARI IN ORDER TO PROVIDE GUIDANCE TO LOWER COURTS ON AN IMPORTANT ISSUE THAT WILL IMPACT THOUSANDS OF PENDING AND FUTURE FELA CASES

The ruling below served to enhance the plaintiffs' recovery, but in doing so failed to pay heed to a recent pronouncement by this Court on an important issue arising under FELA. In *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135 (2003), this Court held that FELA plaintiffs with asbestosis could recover damages for reasonable fear of cancer, as a component of pain and suffering, so long as that fear was "genuine and serious," but "resisted" providing any elaboration on the nature of the evidence required to sustain a claim for genuine and serious fear of cancer. *Id.* at 158, n. 17. This Court should resist no longer. Because the issue that confronted the court below will recur in state and federal courts throughout the country in virtually every FELA asbestos case, and will directly impact the quantum of damages for which defendants will be liable, guidance from this Court is required.

A. The Court Below Ignored the Limitations on Fear of Cancer Recovery Established By This Court in *Ayers*

In permitting recovery for fear of cancer, as a component of pain and suffering damages, by plaintiffs who suffer from an asbestos-related injury, this Court most definitely did not intend that all FELA plaintiffs falling into that category may qualify for damages for fear of cancer. Following on concerns expressed in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994) and *Metro North Comm. R.R. v. Buckley*, 521 U.S. 424 (1997),[2] the *Ayers* opinion makes it clear that such claims are to be "cabined" by the requirement that fear of cancer damages are available only to those plaintiffs who can demonstrate a "genuine and serious" fear. 538 U.S. at 158-59. This Court went to great lengths to point out that in permitting a FELA plaintiff with asbestosis to recover fear of cancer damages, it was doing so with "an important reservation." *Id.* at 157. Responding to Justice Kennedy's dissenting opinion, which suggested the Court was ignoring the concerns expressed in *Gottshall* and *Buckley* over the "unlimited and unpredictable" liability that would follow a failure to limit the availability of damages for fear of cancer, the majority explained that verdict control devices available to trial courts will assuredly avoid that result. *Id.* at 159, n.19. Clearly, the *Ayers* Court anticipated that trial courts would take an active role as gatekeepers over such claims.[3]

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[2] In both *Gottshall* and *Buckley*, this Court enunciated limiting rules on recovery for emotional distress out of concern over unlimited and unpredictable liability.

[3] This Court's specific reference to verdict control devices is significant, and should send a message to lower courts, which

The court below did nothing of the kind. It rejected petitioner's suggestion that the court utilize the definition of "genuine and serious" fear proposed by Justice Breyer in his opinion in *Ayers*,[4] as a "more stringent standard than that handed down by the Court." *Blackburn v. Illinois Cent. R.R. Co.*, 882 N.E.2d 189, 193 (Ill. App. 2008). However, the court made no attempt to provide an alternative definition to the "genuine and serious" qualifier enunciated by the *Ayers* Court as a prerequisite for recovery of fear of cancer damages. Instead, it simply held that plaintiffs' testimony expressing concern or worry about contracting cancer, without more, was sufficient to send the issue to the jury.[5] There was no discussion about what constitutes sufficient evidence of genuine and serious fear, or how the approach fol-

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often are very reluctant to utilize verdict control devices in favor of FELA defendants, primarily based on the belief that FELA's recovery promoting purpose prohibits this traditional exercise of judicial authority. *See e.g., Baker v. Baltimore & Ohio R.R.*, 502 F.2d 638, 641 (6th Cir. 1974)("FELA's liberal purpose must be kept in mind when confronting arguments that would restrict an employer's liability under the Act."); *See also Syverson v. Consolidated Rail Corp.*, 19 F.3d 824 (2nd Cir. 1994)(reversing summary judgment for railroad); *Kansas City Southern Ry. Co. v. Nichols Construction Co.* 2008 WL 3850547 (E.D. La. 2008) ("FELA plaintiffs can survive dispositive motions by offering evidence which would be insufficient to overcome a similar motion in an ordinary civil case." *Id.* at *3)

[4] Justice Breyer proposed that fear of cancer damages be limited to situations where the plaintiff's fear "is unusually severe-where it significantly and detrimentally affects the plaintiff's ability to carry on with everyday life and work." 538 U.S. at 187 (Breyer, J. concurring and dissenting in part).

[5] The Court compounded the problem by giving an instruction that suggested that the plaintiffs' fear of cancer was, in fact, genuine and serious. *See* Petition at 11-12.

lowed by the court below will serve to "cabin" fear of cancer claims brought under FELA. Surely when this Court prominently insisted that only genuine and serious fear of cancer merits recovery, it meant something beyond the plaintiff's testimony the he or she worries about cancer, or some variant of such testimony, was necessary to sustain such a claim.

B. Guidance From This Court is Needed Because This Issue Will Impact Numerous Cases Arising Under FELA

Guidance from this Court on the nature of the evidence required to sustain a fear of cancer claim is needed now. Currently, thousands of FELA claims alleging asbestos-related disease are pending against the nation's railroads. In addition, there are many pending claims that allege an injury resulting from other exposures that plaintiffs typically have attempted to link to cancer, such as diesel exhaust and industrial solvents. All of these cases raise the potential for including "fear of cancer" as an element of the plaintiff's damages. This issue also will impact cases that arise under the Jones Act, a compensation statute governing seamen which incorporates the substantive law of FELA. 46 U.S.C. §30104(a); *see Hagerty v. L&L Marine Services, Inc.*, 788 F.2d 315 (5th Cir.), *modified on denial of reh'g en banc*, 797 F.2d 256 (1986)(permitting Jones Act plaintiff to recover for fear of cancer).

Asbestos litigation in the railroad industry has followed the general pattern seen in the civil justice system as a whole.[6] Claims were first seen in

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[6] See Edward J. McCambridge, *Asbestos Litigation: Where We Have Been, Where We Are Now, Where We Are Going*, 57 FED'N DEF. & CORP. COUN. Q. 409 (2007).

significant numbers in the early 1980s. While at various points it appeared that FELA asbestos claims were in decline, the number of filings invariably picked up again. Despite the fact that significant use of asbestos in the rail industry ended in the 1950s with the phase-out of steam locomotives, FELA claims for asbestos-related injures continue to be filed in large numbers. This phenomenon is no doubt driven in part by the active efforts of plaintiffs' counsel to mine for new claims. *See Adams v. Herron*, 191 F.3d 447, 1999 WL 710326 (4th Cir. 1999) (Plaintiffs' counsel offered free x-rays, which were reviewed and interpreted by a non-treating physician hired by the firm.) "Asbestos litigation over time has been shaped by . . . the rise of a sophisticated and well-capitalized plaintiff bar." RAND INSTITUTE FOR CIVIL JUSTICE, ASBESTOS LITIGATION 21 (2005).

The eight largest U.S. freight railroads and Amtrak have advised the AAR that there are about 9,500 pending asbestos cases at this time. Since *Buckley* has ruled out claims based solely on exposure, in all of these cases the plaintiff presumably alleges that he is suffering from an asbestos-related injury, the very kind of claim which *Ayers* holds potentially qualifies for fear of cancer damages.[7] Even if the relatively small sum of $30,000, which was awarded to each of the plaintiffs in this case, is awarded to each plaintiff in pending cases, the resulting liability would be

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[7] *Buckley* held that individuals who are exposed to asbestos, but who are without symptoms of a disease, cannot recover for emotional distress. 521 U.S. at 427. Though some of the pending FELA claims allege that the plaintiff has cancer, the railroads report that these constitute less than 5% of the total. Thus, the vast majority of the pending FELA asbestos claims allege a non-malignant asbestos-related injury and are likely to include a fear of cancer allegation.

nearly $285,000,000. While some claimants might be awarded less, other could be awarded far more for fear of cancer damages. In *Ayers*, the verdicts for the six plaintiffs ranged from $770,000 to $1.2 million. 538 U.S. at 144. Considering that the plaintiffs were not seriously ill, and were retired (precluding damages for lost wages), it is likely that the jury made substantial awards for fear of cancer damages.

Fear of cancer claims will not necessarily be limited to asbestos litigation. *See Ayers*, 538 U.S. at 150, n.10. (Citing to cases alleging fear of cancer due to exposures to substances other than asbestos.)[8] The large railroads report that several hundred FELA claims are pending in which the plaintiff alleges exposure to other substances that purportedly also can result in contracting cancer. Specifically, rail employees and former employees have brought and continue to bring claims alleging they have been injured due to workplace exposure to alleged carcinogenic substances, such as diesel exhaust, chemical solvents, silica and other toxic or deleterious substances. *E.g., Baker v. Norfolk Southern Ry. Co.*, 514 S.E.2d 448, *cert. denied*, 528 U.S. 1021 (1999) (Alleging locomotive engineer's cancer was caused by prolonged exposure to exhaust from railroad's diesel locomotives.)[9]

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[8] Claims for fear of diseases other than cancer have been recognized under FELA. *E.g., Marchica v. Long Island R.R.*, 31 F.3d 1197 (2nd Cir. 1994)(Fear of contracting AIDS.)

[9] In 2006, class action lawsuits were filed against Norfolk Southern and CSX Transportation, and their predecessor railroads, by and on behalf of locomotive engineers and conductors alleging injury due to exposure to diesel exhaust. Among other things, the complaints allege that the plaintiffs suffer from fear of cancer. *See Taylor v. CSX Transp., Inc.*, 2007 WL 2891085 (N.D. Ohio 2007)(denying class certification).

The magnitude of this issue is further heightened for railroads because they can potentially be liable for all damages suffered by plaintiffs with asbestos-related, or other types of, injuries, even when railroad employment caused a minimal amount of any of the harm suffered. In *Ayers*, this Court held that FELA's joint and several liability scheme prohibited apportionment of damages among joint tortfeasors. As a result, if any exposure to a harmful substance occurred during the plaintiff's railroad employment, the railroad can be held liable for the full extent of the damages even if the majority of the harmful exposure can be attributed to other employment.[10] The effect of this rule is underscored by the fact that one of the *Ayers* plaintiffs was "exposed to asbestos [at the railroad] for only three months" and "worked with asbestos elsewhere as a pipefitter for 33 years." 538 U.S. at 143. Two of the other *Ayers* plaintiffs "had significant exposure to asbestos while working for other [non-railroad] employers." *Id.* Thus, railroads can be fully liable for all asbestos-related damages, including fear of cancer, not just to long-term employees, but also to former employees whose rail employment was fleeting.

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[10] The Court recognized that railroads could pursue contribution and indemnity claims, as permitted under state law. 538 U.S. at 162. Often, however, this remedy is illusory, as many joint tortfeasors who are responsible for a plaintiff's harmful exposure to asbestos are out of business. By mid-2004, over 70 asbestos defendants have dissolved or filed for bankruptcy protection. RAND at 109.

C. Guidance By This Court Will Assure That Lower Courts Undertake Their Proper Gatekeeping Function and Will Avoid Non-Uniform Application of FELA

It is quite likely that without further guidance from this Court, many lower courts will at best pay lip service to their role as gatekeepers of fear of cancer claims. For example, in *Hensley v. CSX Transp., Inc.*, 2008 WL 683755 (Tenn. App. 2008), the court acknowledged that due to the emotional power of references to cancer, juries may well overcompensate plaintiffs for fear of cancer anytime the issue is brought before them. *Id.* at *16. Mysteriously, the court went on to hold that because jurors may be swayed to overcompensate by any mention of cancer, there is no point in instructing the jury that the plaintiff's fear must be genuine and serious. *Id.* The court justified this curious position by noting the role of trial courts as gatekeepers charged with ensuring that fear of cancer claims do not go to the jury in the first place unless there is credible evidence of genuine and serious fear. *Id.*

When it came time for the court to play its gatekeeping role, however, it deferred to the trial court's decision to permit the claim to go to the jury. The court found it sufficient that the plaintiff had testified that he experiences "anxiety" (as opposed to only "worry"), for which he was taking the prescription medication Xanax. The court held that even though the plaintiff testified that he began taking the medication before he learned he had asbestosis, the jury could conclude that his fear of cancer was "at least *part* of the reason [the plaintiff] has *continued* to take Xanax." *Id.* at *17. (emphasis in the original)

Gatekeeping like this will most assuredly open the floodgates to fear of cancer claims.

If this Court demurs from providing further guidance on this issue, confusion and lack of uniformity will continue whenever courts are confronted with fear of cancer claims in FELA cases. Some courts may take their gatekeeping role seriously and require that evidence beyond the plaintiff's stated "worry" is needed before a fear of cancer claim can go to the jury.[11] *E.g., Seaford v. Norfolk Southern Ry. Co.*, 824 N.E.2d 94, 110-112 (Ohio App. 2004), *rev'd on other grounds*, 835 N.E.2d 717 (Ohio 2005). Others, like the court below, undoubtedly will take a far more laissez faire attitude. In any event, this divergence of approaches likely will lead to a lack of uniformity in the interpretation of FELA and, inevitably, forum shopping, a practice facilitated by FELA's broad venue provisions.

FELA plaintiffs are provided with many options when choosing where to bring and maintain their lawsuit. A FELA suit may be brought in either state or federal court in any district in which the railroad does business, 45 U.S.C. §56; and, if a case is brought in state court, it may not be removed to federal court. 28 U.S.C. §1445(a). The four largest railroads in the United States each operate in over than 20 states, and as a result will face asbestos suits over a wide geographical area. Moreover, historically, courts have permitted plaintiffs wide latitude over selection of venue: naturally, plaintiffs often select a venue based on their perception of where courts are likely to

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[11] The *Ayers* Court remarked that none of the plaintiffs' "notably thin" evidence of fear of cancer included any "corroborative objective evidence of his fear." 538 U.S. at 158, n.18.

interpret the law to their advantage. The FELA's venue provision gives plaintiffs "the right to select the court in which he considers it would be most advantageous for him to bring his action." *Petersen v. Ogden Union Ry. & Depot Co.*, 175 P.2d 744, 747 (Utah 1946). For example, the Montana Supreme Court does not recognize the doctrine of *forum non conveniens* in FELA cases, in part, in reliance on FELA's "policy favoring the injured worker's choice of forums [citations omitted] even if that choice of forum involves forum shopping." *State ex rel. Burlington Northern R.R. Co. v. District* Court, 891 P.2d 493, 499 (Mont. 1995).[12] Though FELA is to be interpreted uniformly, *South Buffalo Ry. Co. v. Ahern*, 344 U.S. 367, 371 (1953); *New York Cent. R.R. v. Winfield*, 244 U.S. 147, 150 (1917), plaintiffs who intend to allege fear of cancer no doubt will select a forum in which the court is likely to permit such a claim to go to the jury with minimal evidence.[13]

Though this Court held that "[i]t is incumbent upon [a plaintiff seeking fear of cancer damages] to prove that his alleged fear is genuine and serious," *Ayers*, 538 U.S. at 157, without further guidance lower courts are likely to continue to address the issue presented here in a disparate manner. Moreover, plaintiffs in FELA asbestos and other exposure cases are likely to seek out courts which, like the court below, will eschew their responsibility to remain faith-

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[12] The Court held that "a district court in this state may not dismiss a FELA action because it deems itself to be an inconvenient forum" and "that a district court in this state is not empowered to change the place of trial of a FELA action based on the doctrine of *forum non conveniens*." 891 P.2d at 499.

[13] Asbestos litigation has long been characterized by efforts of plaintiffs to seek favorable jurisdictions. RAND at 61-63.

ful to the *Ayers* requirement that only plaintiffs with genuine and serious fear may qualify for fear of cancer damages. The outcome will be "uncabined" liability for fear of cancer damages—a clear departure from the holdings of *Gottshall*, *Buckley* and *Ayers*. This result will be avoided if this Court grants the petition and provides guidance on the evidentiary burden a plaintiff alleging an asbestos-related injury must meet to establish a "genuine and serious" fear of contracting cancer.

CONCLUSION

For the reasons set forth herein, this Court should grant the petition.

Respectfully submitted,

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